Supreme Court, U.S.
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No. 97-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Petitioner,

v.

CITY OF PHILADELPHIA, and
CONSOLIDATED RAIL CORPORATION,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Pennsylvania Public Utility Commission's allocation of costs to National Railroad Passenger Corporation for repair, alteration, rehabilitation or maintenance of a bridge carrying a City of Philadelphia street above the right of way of the National Railroad Passenger Corporation constitutes a "tax or fee" within the meaning of 49 U.S.C. § 24301(*l*)(1)?

LIST OF PARTIES

The parties who were served with notice o
tiary proceeding leading up to this Petitio
been served with a copy of this Petition
Certiorari are: the City of Philadelphia (
respondent), Consolidated Rail Corporation
a respondent), the Pennsylvania Departmer
portation, Southeastern Pennsylvania Transp
thority, and the National Railroad Passenger
In addition, the Wheeling & Lake Erie Railw
and Scott Township have been served with a
Petition.

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IN THE

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PENNSYLVANIA PUBLIC UTILITY COMMISSION,
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CITY OF PHILADELPHIA, and
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Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

---

PETITION FOR A WRIT OF CERTIORARI

The Petitioner Pennsylvania Public Utility Commission respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Pennsylvania Supreme Court, entered in the above-entitled proceeding on October 29, 1996.

OPINIONS BELOW

The orders of the Pennsylvania Supreme Court denying the petitions for allowance of appeal from the opinion of the Commonwealth Court of Pennsylvania are reprinted in the appendix hereto (App. A, p. 1a).

The opinion of the Commonwealth Court of pennsylvania is reported at 676 A.2d 1298 (1996). It is reprinted in the appendix hereto (App. B, p. 3a).

JURISDICTION

On October 29, 1996, the Supreme Court of Pennsylvania denied the petition for allowance of appeal filed by the Pennsylvania Public Utility Commission, leaving intact the May 23, 1996 decision of the Commonwealth Court of Pennsylvania. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTES INVOLVED

The relevant provisions of 49 U.S.C. § 24301(*l*), and 66 Pa. C.S.A. §§ 2702, 2704 are reprinted at Appendix C, p. 26a.

STATEMENT OF THE CASE

The federal courts in the Third Circuit and the state courts of Pennsylvania have reached conflicting and irreconcilable decisions regarding a federal tax exemption issue which have the effect of preventing a state administrative agency from performing its public safety functions effectitvely. This conflict must be resolved by this Honorable Court.

The Pennsylvania Public Utility Commission (PUC or Commission) is an independent administrative agency of the Commonwealth of Pennsylvania which operates in a quasi-judicial capacity and is charged with, among other things, the "prevention of accidents and the promotion of safety of the public" where railroad rights-of-way meet public highways within the confines of Pennsylvania. 66 Pa. C.S. § 2702(b). No construction, relocation, alteration, protection, suspension or abolition of a rail-highway crossing may occur without an order from the Commission, which may order necessary work to be performed and paid for by any public utility or municipal corporation concerned or by the Commonwealth. 66 Pa. C.S. §§ 2702(c), 2704(a).

Pursuant to these and other related sections of the Pennsylvania Public Utility Code, the Commission regularly holds evidentiary hearings before an Administrative Law Judge on rail-highway crossing cases, usually taking the form of applications, complaints, or Commission staff-instituted investigations to determine what construction or maintenance should be performed by what party and what party should bear the final costs of that action.

Prior to 1987, the Commission treated Amtrak like any other railroad and regularly assigned Amtrak its fair share of (a) the capital costs of rail-highway construction and repair projects and (b) the annual costs and responsibility for future maintenance of highway bridges over railroad rights-of-way. These sums represent actual costs of projects and maintenance, and, for decades have been shared among the railroads and other parties who benefit from the crossings. No portion of these funds are paid to the PUC or any Commonwealth agency in the form of a "tax" or "fee" for the support of governmental functions. In 1987, however, Amtrak sued the Commission in federal district court, claiming that such assessments, which represent amounts spent to repair and maintain rail-highway crossings, were a form of tax prohibited under federal law.

The federal courts in the Third Circuit have ruled uniformly that, pursuant to the provisions of 49 U.S.C. § 24301(*l*), the PUC is prohibited from requiring Amtrak to contribute its fair share to the repair and maintenance of crossings necessitated by the existence of Amtrak facilities, *National Railroad Passenger Corporation v. Pa. P.U.C.*, 665 F.Supp. 402 (E.D. Pa. 1987), *aff'd* 848 F.2d 436 (3rd Cir. 1988), *cert. denied*, 109 S.Ct. 231 (1988), reproduced herein as Appendix D, although the Second Circuit would seem to disagree. *National Railroad Passenger Corporation v. City of New York*, 882 F.2d 710 (2nd Cir. 1989), *affirming* 695 F. Supp. 1570 (S.D. N.Y. 1988), reproduced here as Appendix E.

In 1988, Congress extended the exemption to "any commuter authority that could have contracted with Amtrak Commuter for the provision of commuter service but which elected to operate directly its own commuter service," 49 U.S.C. § 24501(g). The Southeastern Transportation Authority, which provides commuter service to the five-county Philadelphia area, failed in its attempt to achieve exemption from PUC assessment in the state court, *SEPTA v. Pa. P.U.C.*, 592 A.2d 797 (Pa. Cmwlth. 1991) *alloc. denied*, 531 Pa. 632, 611 A.2d 714 (1992), but was successful in the courts of the Third Circuit, *SEPTA v. Pa. P.U.C.*, 826 F.Supp. 1506 (E.D. Pa. 1993) *aff'd w/o opinion*, 27 F.3d 558 (3rd Cir. 1994) *cert. denied*, 115 S.Ct. 318 (1994). As a result, the same state of conflict exists regarding the PUC's ability to assess SEPTA as with Amtrak.

The facts of this case are undisputed. On November 4, 1993, when the City of Philadelphia (City) informed the PUC that as a result of the deteriorating structural condition of the 41st Street Bridge over the tracks of Amtrak, Southeastern Pennsylvania Transportation Authority (SEPTA), and Consolidated Rail Corporation (Conrail), the City had reduced the posted allowable load limit from 20 tons to 3 tons. By order entered December 10, 1993, the PUC initiated an investigation into the maintenance responsibility of the crossing at Docket No. I-00930028 (*41st Street Bridge*), directing: (1) that Amtrak prepare and submit plans and carry out construction necessary to restore the piers and bearings of the bridge to their original load-carrying capacity at the initial cost of the City; (2) that the City perform cursory inspections of the bridge bearings and report any further deterioration to the PUC; and, (3) that the matter be scheduled for hearing.

Amtrak filed a Petition for Reconsideration, Amendment and Supersedeas of the December 10th order on December 24, 1993, claiming exemption under federal

statute [1] and case law. Amtrak also stated that it would not agree to perform any of the work ordered by the PUC.

Following notice to the parties, an evidentiary hearing was held on June 16, 1994 before an administrative law judge. The bridge was closed to motor vehicle traffic pursuant to PUC emergency order dated December 6, 1994, ratified by the PUC on December 15, 1994.

The Administrative Law Judge issued the Recommended Decision on January 20, 1995, which was adopted by the PUC by order entered March 31, 1995. The order also denied the exceptions filed by the City and Conrail. The issue in question here, whether or not Amtrak could be assessed any costs in this case, is addressed by the PUC on pages 19 and 23 in its order, which finds that the decisions of the federal courts did not allow the Commission to assess costs against Amtrak. Instead, the Commission ordered the other parties to bear the costs. The order directed that: (1) the City, at its initial cost and expense, perform an in-depth inspection to determine the structural damage and the type of repairs needed to rehabilitate the bridge; (2) the City, at its initial cost and expense, prepare construction plans to repair the bridge; (3) the City, at its initial cost and expense, furnish all material and perform all work necessary to complete the construction of the project in accordance with the approved construction plans; (4) Conrail reimburse the City in the amount of twenty percent of the actual cost of the in-depth inspection, the preparation of the plans and the repairs; (5) Conrail, at its initial cost and expense, furnish all material and do all work necessary to maintain the substructure of the bridge in a safe and satisfactory condition; and

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[1] 45 U.S.C. § 546b was repealed by § 7(b) of the Act of July 5, 1994, Pub. L. 103-272, 108 Stat. 1379; it was reenacted with linguistic but not substantive change and recodified at 49 U.S.C. § 24301(*l*) by § 1(e) of the same Act, 108 Stat. 904. *See* H.R. Rep. No. 180, 103d Cong., 2d Sess. 1, 3, 4 (1993) *reprinted in* 1994 U.S.C.C.A.N. 818, 820, 822, reprinted in Appendix C herein.

(6) the City, upon completion of the repairs, provide all material and perform all work to maintain the approaches to the bridge in a safe and satisfactory condition. From this order, both the City and Conrail appealed to the Commonwealth Court.

Before the Commonwealth Court, the City questioned its assigned costs and responsibilities, as well as the PUC's failure to adopt the terms of a 1927 contract between the City and the Pennsylvania Railroad, claiming that Conrail and Amtrak are the lawful successors of the defunct company.[2]

Conrail claimed that the PUC should determine costs in cases where the Amtrak exemption is a factor by figuring the allocation to all parties, then taking the Amtrak portion and reallocating it to the government entities in the case in order to satisfy the Congressional intent to impose a "user" fee on state and local government for continued passenger rail service.

The Pennsylvania Commonwealth Court, however, did not address the merits of either appeal. Instead, the Court examined the PUC's jurisdiction in rail-highway crossing cases and analyzed the decisions in the federal courts cases which purport to limit that jurisdiction pursuant to 49 U.S.C. § 24301(*l*). The Commonwealth Court decided that the federal courts were incorrect in finding that the PUC assessments against parties in rail-highway crossing cases are "taxes or other fees" within the meaning of

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[2] The City of Philadelphia has since filed suit against Conrail in the Special Court of the Regional Rail Reorganization Act at Docket No. 96-01, asking that Court to find that the rights and responsibilities of the Pennsylvania Railroad as set out in the 1927 contract which resulted in the construction of the subject bridge have been passed on to Conrail. Conrail then filed suit against the PUC at Docket No. 96-03, asking the Court to enjoin the PUC from (1) enforcing the terms of the 1927 contract against Conrail, and (2) ordering Conrail to perform any repairs, construction or maintenance due to deterioration or problems which occurred prior to April 1, 1976 (the statutory date of Conrail's creation). Both cases are still pending, and neither case litigates the question presented here.

the federal statute: therefore, according to the Pennsylvania appellate court's interpretation of the federal tax exemption statute, Amtrak should be considered to be a "party in interest" for purposes of allocating costs and responsibilities. The Commonwealth Court then vacated the PUC's decision and remanded the case with specific instructions "to apportion costs for the planning, repair and maintenance of the bridge between the present parties and the National Railroad Passenger Corporation in accordance with the foregoing opinion."

The PUC's Petition for Allowance of Appeal to the Pennsylvania Supreme Court was denied. Accordingly, the Commonwealth Court decision represents the final determination of the state courts on the tax exemption issue.

The PUC, however, cannot act at all without running afoul of either the federal courts of the Third Circuit or the Pennsylvania Commonwealth Court. If the PUC follows the direction of the Commonwealth Court and considers Amtrak among the parties to whom costs may be allocated and to reassess the costs for the project accordingly, then Amtrak will sue the PUC in federal district court, where the PUC will lose. Alternatively, if the PUC declines to follow the order of the Commonwealth Court, then the Pennsylvania appellate court will hold the PUC in contempt. As such, the PUC now faces an irreconcilable conflict between two court systems regarding its statutory authority to allocate costs to repair and maintain highway bridges over railroad rights-of-way.

The Commonwealth Court, in interpreting a federal tax exemption statute, has rendered an opinion and order which is in direct and irreconcilable conflict with several Third Circuit and district court decisions on the same issue. The Commonwealth Court decision does, however, follow a decision issued by the Second Circuit Court of Appeals. The resolution of this issue will impact the cases now pending before the PUC regarding highway crossings with Amtrak facilities, as well as an untold number of future cases.

REASONS FOR GRANTING THE WRIT

This case raises a recurring question which has not been decided by this Court: whether the PUC assessment of costs and responsibilities under its jurisdiction over safety issues in rail-highway crossing cases are taxes or fees within the meaning of 49 U.S.C. § 24301(*l*)? A decision by this Honorable Court is necessary because: (1) case law reveals a serious and irreconcilable conflict between the Third Circuit and the state courts of Pennsylvania; (2) case law also reveals a conflict between the decisions in the Third Circuit and the Second Circuit on the same issue; (3) the PUC cannot decide any cases where Amtrak or SEPTA is a party without running afoul of either the federal or state courts, which prevents the PUC from fulfilling its statutory mandate regarding safety issues in rail-highway crossing cases until this question is resolved; and (4) the characterization of PUC assessments as a "tax" has serious ramifications in other cases.

I. THE DECISIONS OF THE THIRD CIRCUIT AND THE COURTS OF PENNSYLVANIA PRESENT A CLEAR AND IRRECONCILABLE CONFLICT

The PUC cannot issue a decision involving a crossing on the right-of-way which Amtrak either owns or operates in Pennsylvania without violating the holding of either the federal courts or Pennsylvania courts. The conflict is clear: the federal district courts under the Third Circuit have labeled PUC assessments against Amtrak [3] to be a "tax or fee" within the meaning of 49 U.S.C. § 24301 (*l*) despite the fact that neither the PUC nor the Commonwealth of Pennsylvania receives any portion of the assessment for the support of governmental functions.

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[3] Although this case addresses the exemption in relation to Amtrak, another statute extends "the same exemption" to Southeastern Transportation Authority. 49 U.S.C. § 24501(g). Therefore, the holding of this Court affects not only the crossings on the Amtrak corridor but those crossings on the SEPTA rail lines in the five-county Philadelphia area as well.

Every cent is spent to repair or maintain the railroad crossing, and the money changes hands among the parties involved. The PUC neither accepts nor dispenses any of the sums.

The state court decision, recognizing that none of the assessed costs are paid to the government or used to support general government obligations, reviews the history of applicable law and the traditional duties of railroads regarding crossings with highways and concludes:

> The PUC's allocation of costs does not meet the definition of a tax: it is not a legislative function; it does not disregard benefits to the railroad; it is not a revenue-raising method imposed on a class of similarly situated parties; and, it is not intended for general public benefit. Nor is it a fee charged for a specific benefit by a public agency. Instead, the allocation was intended to be a timely, fair method of ensuring the safety of the public by those responsible for the crossing. Illustrating most vividly that it is not a tax or fee, the PUC can order the Commonwealth and local governments to pay private bodies for reconstruction or maintenance of crossings; whoever heard of a tax or fee that governments pay to private entities?

City of Philadelphia v. Pa. P.U.C., 676 A.2d 1298, 1308 (Pa. Cmwlth. 1996).

Contrast the Pennsylvania Commonwealth Court's opinion with the Third Circuit's approach, which is to review Amtrak's history, to characterize PUC assessments as "similar to 'special assessments' exacted by local municipalities to finance such projects as the construction and upkeep of streets, sidewalks, and sewers," 848 F.2d at 438; the Third Circuit adopted this unique line of reasoning despite long-standing historical requirements that railroads are responsible for repair and maintenance to those areas where they intersect with public rights-of-way, and

to conclude that the statute intended to impose a "user fee" on state and local governments.

The two decisions cannot be reconciled, and the PUC cannot decide any cases involving either Amtrak or SEPTA without violating the holding of one of the courts. In the interim, the PUC is precluded from effectively exercising its public safety responsibilities over rail-highway crossings in Pennsylvania.

II. THE DECISIONS OF THE THIRD AND SECOND CIRCUIT CREATE A CONFLICT OF LAWS

In *National Railroad Passenger Corporation v. City of New York*, 882 F.2d 710 (2nd Cir. 1989), Amtrak alleged before a New York federal district court that its exemption from "taxes and other fees" also exempted it from having to make payments to the City under two certificates executed by its predecessor railroads which granted the right to build and maintain tunnels and facilities under city streets and publicly-owned land in exchange for an annual "sum or rental." After pointing out the differences between taxes and payments for municipal services, the Second Circuit Court of Appeals states, "Nor is there an indication that Congress intended Amtrak to be able to use property, whether private or public, without paying for the right to use it." 882 F.2d at 715.

Although the Second Circuit case involves a rental payment, it is analogous to the long-standing common law requirement that a railroad be responsible for those areas where its facilities cross public rights-of-way, i.e., rail-highway crossings. The Second Circuit concluded that Congress did not intend to exempt Amtrak from the payment of fees which were not taxes, and scrutinized the character of the fees in the case compared to the character of taxes. The same scrutiny leads to the conclusion that the assessments made by the PUC in rail-highway crossing cases are not taxes either.

The point of the exemption is to keep Amtrak from using federal funding to pay local taxes, which are fees imposed unilaterally by a sovereign on its residents. 882 F.2d at 714. PUC assessments are made according to the circumstances developed during an evidentiary proceeding and are limited to those parties who are "concerned" within the meaning of the Public Utility Code, 66 Pa. C.S. §§ 2702, 2704, which means those with facilities at the crossing location.[4] The parties benefitting from the crossing are charged with the cost of constructing, repairing, maintaining, and abolishing it. No portion of the cost goes to the PUC; rather, the entire amount is applied to the actual cost of the work performed.

This type of assessment fits squarely into the category for which Amtrak should still be responsible, as is recognized by the analysis of the Second Circuit Court of Appeals. The Second Circuit's analysis conflicts directly with the analysis of the Third Circuit, and this Honorable Court's review is necessary to settle the conflict.

III. THE PUC CANNOT ISSUE ANY DECISIONS IN CASES INVOLVING AMTRAK OR SEPTA WITHOUT RUNNING AFOUL OF THE DECISION OF EITHER THE FEDERAL OR STATE COURT

It is obvious that a new decision by the PUC in the case in controversy before this Court cannot be issued without violating either the holdings of the federal courts in the Third Circuit or the holdings of the Pennsylvania state courts. What is less obvious is that the conflicting holdings have far-reaching ramifications.

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[4] This is true with the occasional exception of Pennsylvania Department of Transportation, which may be assessed an amount even when the highway involved is not a state highway. *Com., Dept. of Transportation v. Pa. P.U.C.*, 452 A.2d 619 (Pa. Cmwlth. 1982). No other party has been assessed any amount at a location where it had no contact.

Amtrak either owns or operates on a line of railroad from one end of Pennsylvania to the other. Although the PUC is unlikely to hold Amtrak responsible for the conditions at a crossing where another railroad owns the right-of-way, there still exists a stretch of approximately one hundred miles, from Harrisburg to Philadelphia, which is owned by Amtrak. According to the Federal Railroad Administration 1993 count, there are approximately three hundred and thirteen (313) Amtrak crossings and five hundred and sixty (560) SEPTA crossings in the Commonwealth of Pennsylvania. Whenever any work beyond routine maintenance needs to be performed at any one of those crossings, a PUC case must be initiated in order to obtain permission for the work.

None of the costs for any work done at those crossings, unless agreed to by the parties, can be allocated without violating the holding of either the Third Circuit federal courts or the Pennsylvania courts.

IV. THE CHARACTERIZATION OF PUC ASSESSMENTS AS TAXES HAS FURTHER RAMIFICATIONS IN OTHER CASES

The characterization of PUC assessments as "taxes" has ramifications beyond the Amtrak exemption statute. On October 20, 1994, the Wheeling and Lake Erie Railway Company (W&LE) filed a complaint in the United States District Court for the Western District of Pennsylvania alleging that a PUC assessment to reimburse a township for three percent of costs incurred in reconstructing a highway bridge over W&LE facilities is not only a tax, but is a discriminatory tax pursuant to 49 U.S.C. § 11503. The district court adopted the opinion and order of the magistrate on October 11, 1996, which enjoined the PUC from assessing against or collecting from plaintiff any costs associated with the construction or maintenance of the bridge in question. The order declared that the assessment, levy or collection of the

assessment "is a discriminatory tax which violates Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 11503." *Wheeling & Lake Erie Railway Company v. P.U.C., et al.*, Civil Action No. 94-1776 (W.D. Pa. 1996).

The District Court's decision is based on the Third Circuit decisions in the Amtrak and SEPTA cases, stating that since the PUC assessments in rail-highway crossing cases are "taxes" which are not levied against other commercial and industrial tax payers or common carriers, then they are discriminatory taxes. In other words, it appears that the narrow, party-specific basis for the assessment of rail-highway construction costs is now being used to argue that since, according to the Third Circuit, these rail-highway construction costs are "taxes" and are assessed on a narrow-party-specific basis, these "taxes" are discriminatory taxes in violation of 49 U.S.C. § 11503.

The case is being appealed to the Third Circuit Court of Appeals by both the PUC and Scott Township, *Wheeling & Lake Erie Railway Company v. P.U.C., et al.*, Docket Nos. 96-3703 and 96-3704 and the outcome of that case rests on the decision of this Honorable Court in the present case. A finding that the PUC assessment is not a tax will affirm the ability of the PUC to adjudicate cases involving rail-highway crossings; however, a finding that the PUC assessment is a tax will effectively strip the PUC of its ability to require railroads to bear responsibility for safety-based projects and maintenance at rail-highway crossings. This responsibility-free existence for railroads is contrary to both the original common law requirement that railroads construct a crossing with a public highway in a safe manner and maintain it, and to the jurisdiction of the PUC dating back to 1913, when the Public Service Company Law was enacted in Pennsylvania. *See City of Philadelphia v. Pa. P.U.C.*, 676 A.2d 1298, 1305-1306 (Pa. Cmwlth. 1996).

The grant of a writ of certiorari is critical to the ability of the PUC to carry out its duty to prevent accidents and promote public safety at rail-highway crossings.

CONCLUSION

Because there exists an irreconcilable conflict between the Third Circuit and the Courts of Pennsylvania which leaves the Pennsylvania Public Utility Commission, the agency charged with prevention of accidents and the promotion of the safety of the public at rail-highway crossings, unable to perform its duties for over eight hundred and sixty (860) rail-highway crossings without violating the holding of either court, then certiorari should be granted to decide whether the PUC assessment of costs and responsibilities under its jurisdiction over safety issues in rail-highway crossing cases are taxes or fees within the meaning of 49 U.S.C. § 24301.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 401 M.D. Alloc. Dkt. 1996

CITY OF PHILADELPHIA,
Respondent,

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Petitioner.

Petition for Allowance of Appeal
from the Opinion and Order of the
Commonwealth Court

No. 402 M.D. Alloc. Dkt. 1996

CONSOLIDATED RAIL CORPORATION,
Respondent,

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Petitioner.

Petition for Allowance of Appeal
from the Opinion and Order of the
Commonwealth Court

ORDER

PER CURIAM:

AND NOW this 29th day of October, 1996, the Petitions for Allowance of Appeal are DENIED WITHOUT PREJUDICE.

Madame Justice Newman did not participate in the consideration or decision of this matter.

APPENDIX B

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

No. 1999 C.D. 1995

CITY OF PHILADELPHIA,
Petitioner

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Respondent

No. 2100 C.D. 1995

CONSOLIDATED RAIL CORPORATION,
Petitioner

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Respondent

ARGUED: April 16, 1996

Before: HONORABLE DORIS A. SMITH, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE EMIL E. NARICK, Senior Judge

OPINION BY JUDGE PELLEGRINI Filed: May 24, 1996

The City of Philadelphia (City) and Consolidated Rail Corporation (Conrail) present cross-appeals of a decision of the Pennsylvania Public Utility Commission (PUC)

directing the City to incur the costs of performing an inspection, preparing construction plans and reconstructing a bridge and directing Conrail, upon completion, to reimburse the City for 20 percent of the actual cost of the inspection, planning and repairs to the bridge. The bridge carries 41st Street, a City street in West Philadelphia, over railroad tracks used principally for passenger rail service.

In November of 1993, the City informed the PUC that it found the 41st Street Bridge to be in a deteriorating structural condition and had reduced its load limit from 20 tons to three tons. The 41st Street Bridge crosses six railroad lines, four are currently owned by the National Railroad Passenger Corporation (Amtrak) and the remaining two are owned by Conrail. Conrail's railroad tracks have not been used in recent years. Amtrak's tracks are used both by Amtrak and, on lease, by the Southeastern Pennsylvania Transportation Authority (SEPTA).[1]

All parties agreed that further investigation was needed, but none agreed to perform any of the work. The PUC initially ordered that plans be made to restore the bridge to its original load limit by Amtrak but at the cost of the City. Amtrak petitioned for reconsideration, asserting, among other things, that it is exempt from paying such costs, and hearings were scheduled before an administrative law judge (ALJ). While the case was pending before the PUC, the City closed the bridge to all motor vehicle traffic due to continuing deterioration.

The ALJ found that the bridge was built by the Pennsylvania Railroad in 1928. Pennsylvania Railroad signed an agreement with the City in 1927 requiring the railroad to maintain the bridge. Pennsylvania Railroad was succeeded by Penn Central Transportation Company which

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[1] SEPTA is not a party before us because the PUC concluded that it leases its tracks from Amtrak and has no ownership interest in the railroad tracks.

acknowledged responsibility for maintenance of the bridge under the 1927 agreement with the City. In 1976, Penn Central transferred the property and right-of-way for the tracks to Conrail. Conrail immediately transferred the property and right-of-way for some of the tracks to Amtrak. Corresponding to its ownership, Amtrak solely performed maintenance on the bridge while the City solely performed maintenance on the approach roadways to the bridge.

The ALJ found that the City should perform an in-depth inspection, prepare plans and perform repairs to the bridge. The ALJ recommended that, after the work was completed, Conrail reimburse the City for 20 percent of all actual costs of the reconstruction and thereafter maintain the bridge. The City, the ALJ found, should be responsible for maintaining the approaches to the bridge. Although Amtrak was not present at the hearing and presented no acceptable evidence, the ALJ held that the PUC has no authority to order Amtrak to repair and maintain the bridge, citing *National Railroad Passenger Corporation v. Pennsylvania Public Utility Commission*, 665 F.Supp. 402 (E.D. Pa. 1987), *affirmed*, 848 F.2d 436 (3rd Cir. 1988), *cert. denied*, 488 U.S. 893 (1988) (*Amtrak I*), wherein the Third Circuit held that the PUC could not impose costs of reconstructing a bridge crossing on Amtrak because Amtrak was statutorily exempt from all state taxes and fees. The PUC adopted the findings and recommended decision of the ALJ. The City then filed this appeal and Conrail filed a cross-appeal.[2] After its initial petition to the PUC, Amtrak has chosen not to participate before the PUC or this court.

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[2] Our scope of review is limited to determining whether the PUC violated constitutional rights, committed an error of law, rendered a decision that is not supported by substantial evidence, or has violated its rules of practice. *Greene Township Board of Supervisors v. Pennsylvania Public Utility Commission*, 668 A.2d 615 (Pa. Cmwlth. 1995).

I.

Pursuant to Sections 2702(b) and 2704(a) of the Public Utility Code (Code), 66 Pa. C.S. §§ 2702(b) and 2704(a),[3] the Commission is vested with the authority to determine who shall bear the costs associated with the repair or maintenance of a railroad crossing and the facilities at or adjacent to such a crossing in order to protect the safety of the public.[4] In exercising this authority, the PUC is not limited to any fixed rate with respect to the allocation of costs, but instead, may take all relevant factors into consideration. *Department of Transportation*

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[3] Section 2702(b) of the Code provides, in pertinent part:

> The [PUC] is hereby vested with exclusive power to appropriate property for any [rail-highway] crossing, . . . and to determine and prescribe, by regulation or order, the points at which, and the manner in which, such crossing may be constructed, altered, relocated, suspended or absolished, and the manner and conditions in or under which such crossing shall be maintained, operated and protected to effectuate the prevention of accidents and the promotion of the safety of the public.

As to cost allocation, Section 2704(a) of the Code provides, in pertinent part:

> [T]he cost of construction, relocation, alteration, protection, or abolition of such crossing, and of facilities at or adjacent to such crossing which are used in any kind of public utility service, shall be borne and paid, as provided by this section, by the public utilities or municipal corporations concerned, or by the Commonwealth, in such proper proportions as the [PUC] may, after due notice and hearing, determine, unless such proportions are mutually agreed upon and paid by the interested parties.

[4] A railroad-highway crossing is the intersection of a highway with a railroad's right-of-way upon which railroad tracks lie and can be at, above or below the grade of the railroad tracks. *Southeastern Pennsylvania Transportation Authority v. Pennsylvania Public Utility Commission*, 592 A.2d 797, 800 n.2 (Pa. Cmwlth. 1991), *petition for allowance of appeal denied*, 531 Pa. 642, 611 A.2d 714 (1992). A crossing can also include other public utilities, such as gas, water or electric facilities.

v. Pennsylvania Public Utility Commission, 469 A.2d 1149 (Pa. Cmwlth. 1983). The allocation of costs between the parties is within the discretion of the PUC, but such allocation must be just and reasonable. *Borough of South Greensburg v. Pennsylvania Public Utility Commission*, 544 A.2d 82 (Pa. Cmwlth. 1988). The decision must be based upon some sound legal or factual basis. *Port Authority of Allegheny County v. Pennsylvania Public Utility Commission*, 207 Pa. Superior Ct. 299, 217 A.2d 810 (1966).[5]

The City contends that the PUC erred in holding that it could not require Amtrak to be responsible for maintenance costs and in not enforcing the 1927 agreement against Amtrak and Conrail as successors of the railroad which assumed all maintenance costs in that agreement. The City also contends the PUC erred in holding that it had any responsibility for maintenance based on the 1927 agreement and based on the fact that Amtrak and Conrail received the benefit of the bridge crossing over their tracks. The City contends that the allocation to Conrail, to pay 20 percent of the repair and none of the costs of the detour or approach roadways, is too low. Conrail contends that there should be no assessment against it because it receives no benefit from the bridge, since the tracks it owns under the bridge are inactive. It also

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[5] Recently, in *Greene Township Board of Supervisors*, 668 A.2d at 619, we restated the factors which have consistently been viewed as relevant to the PUC's allocation of costs:

1. The party that originally built the crossing.
2. The party that owned and maintained the crossing.
3. The relative benefit initially conferred on each party with the construction of the crossing.
4. Whether either party is responsible for the deterioration of the crossing that has led to the need for its repair, replacement or removal.
5. The relative benefit that each party will receive from the repair, replacement or removal of the crossing. (Citations omitted).

contends the PUC cannot enforce the 1927 agreement against it, because its enabling statute prohibits successor liability.

II.

The overriding question before us is whether the PUC erred in holding that it cannot order Amtrak to pay costs for construction or repair of a bridge over Amtrak facilities. The PUC's holding was based on the federal court decision in *Amtrak I*, that such an allocation of costs was a tax on Amtrak in violation of 45 U.S.C. § 546b,[6] which grants Amtrak an exemption from "a tax or fee imposed by a State". The City argues that this court's decision in *Southeastern Pennsylvania Transportation Au-*

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[6] Section 546b was repealed by § 7(b) of the Act of July 5, 1994, Pub.L. 103-272, 108 Stat. 1379; it was reenacted with linguistic but not substantive change and recodified at 49 U.S.C. § 24301(*l*) by § 1(e) of the same Act, 108 Stat. 904. *See* H.R. Rep. No. 180, 103d Cong., 2d Sess. 1, 3, 5 (1993). As now codified at 49 U.S.C. § 24301(*l*)(1), the federal statutory exemption provides:

> Amtrak or a rail carrier subsidiary of Amtrak is exempt from a tax or fee imposed by a State, a political subdivision of a State, or a local taxing authority and levied on it after September 1, 1981. . . .

The subsequent provision provides jurisdiction in the federal district courts for actions brought by Amtrak to enforce the exemption, but does not preclude this court's jurisdiction over Amtrak. Because the relevant exemption has been referred to as Section 546b in numerous prior cases, for consistency, we will continue to use that reference.

The historical setting for Congress' creation of Amtrak was set forth in *National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Railroad*, 470 U.S. 451, 453-57 (1985). Congress enacted the Rail Passenger Service Act in 1971 in an effort to revive the failing intercity passenger lines and established a private corporation known as Amtrak. *Amtrak I*, 848 F.2d at 438. Because Amtrak's financial standing was poor, despite federal subsidies, and it was spending a substantial amount on state and local taxes ($14 million in 1908), Congress enacted the tax exemption in 1982. Pub.L. 97-257, 96 Stat. 852 (September 10, 1982).

thority v. Pennsylvania Public Utility Commission, 592 A.2d 797 (Pa. Cmwlth. 1991), *petition for allowance of appeal denied,* 531 Pa. 642, 611 A.2d 714 (1992) (*SEPTA I*) that the exemption for taxes and fees, in the same federal statute, is inapplicable to the PUC's cost allocation to SEPTA, allows the PUC to impose such costs on Amtrak. In resolving this question, we first address the prior cases addressing Amtrak's liability and the historical basis for the PUC's jurisdiction over the matter.

A. *Prior Case Law*

In *Amtrak I,* the first case addressing the issue, the PUC ordered Amtrak to pay 20 percent of the replacement cost of a bridge located in Tredyffrin Township, with the remaining 80 percent paid by the township, subject to reimbursement from the state. Amtrak sought declaratory and injunctive relief in federal court. In determining whether the allocation of reconstruction and maintenance costs to Amtrak is prohibited by the exemption for "a tax or fee", the Third Circuit stated that the costs were similar to "special assessments". Holding that such "special assessments" amounted to taxes on Amtrak, as we noted in *SEPTA I,* the Third Circuit court gave special consideration to the statute's legislative history and purpose:

> • The Senate Appropriations Committee reasoned that "such taxation serves to erode the revenue-to-cost ratios which impact on whether States and localities continue to receive the benefits of Amtrak service." S.Rep. No. 253, 97th Cong., 1st Sess. 103 (1981).
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> • A Senate Committee Report commented that "there are many parts of the country which would gladly pay an amount equal to local or State taxes owed by Amtrak in order to have the benefit of Amtrak service." S.Rep. No. 516, 97th Cong., 2d Sess. 170 (1982).

- Amtrak was created to maintain and improve rail passenger service with federal financial support and the payment of taxes would impinge on the ability to carry out that service.

Amtrak I, 848 F.2d 437-440. Affirming the District Court, the Third Circuit held the allocation of costs were taxes from which Amtrak was exempt because it would be inappropriate to undermine the goals of Amtrak through "the too stingy construction of the exemption". *Id.* at 437.

Thereafter, the PUC issued an order requiring the bridge to be maintained rather than replaced and ordered Amtrak to contribute to the cost of maintenance. Amtrak requested the federal courts to enforce their previous injunction against the PUC to prevent the new cost allocation. In a memorandum opinion, Judge Newcomer, for the District Court, held that the imposition of maintenance costs was enjoined by the order in *Amtrak I* and that the PUC's action violated that order. The District Court's order reiterated a permanent injunction against the PUC's imposition of any costs of maintenance for the bridge against Amtrak. *National Railroad Passenger Corporation v. Commonwealth of Pennsylvania and Township of Tredyffrin*, No. 86-5357, filed January 2, 1991. Judge Newcomer also awarded Amtrak its costs and attorney's fees incurred not only in enforcing the injunction but also in contesting before the PUC the imposition of the maintenance costs. *National Railroad Passenger Corporation v. Commonwealth of Pennsylvania and Township of Tredyffrin*, No. 86-5357, filed July 1, 1991.

The Second Circuit Court of Appeals, however, has more narrowly applied the exemption. In *National Railroad Passenger Corporation v. City of New York*, 882

F.2d 710 (2nd Cir. 1989), *affirming*, 695 F.Supp. 1570 (S.D.N.Y. 1988) (*Amtrak II*), the city had entered an agreement with Pennsylvania Railroad to allow it to use routes in the city for the payment of an annual "rental". As the successor of Pennsylvania Railroad, Amtrak argued that it was exempt from the payments. The District Court disagreed with Amtrak's assertion that it was exempt and the Second Circuit affirmed. Contrary to the Third Circuit, the Second Circuit held that the payments under the agreement were "rent", or payments for the use of City property, and were not taxes or fees from which Amtrak is exempt. *Id.* at 716. The Second Circuit examined the legislative history of the exemption for "a tax or fee" finding that:

> • A committee report stated that the legislation was intended to exempt Amtrak from paying "property taxes, income and franchise taxes, sales taxes, gross revenue taxes, fuel taxes, licenses and other fees, to the same extent as the United States is exempt from the payment of such taxes or other fees." H.R. Rep. No. 81, 97th Cong., 1st Sess. 19, 21 (1981).
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> • The committee report stated that "it is not the Committee's desire to exempt Amtrak from the payment of fees for services used, such as water and sewer, just as the United States is not exempt from the payment of such fees." *Id.*
>
> • There is no evidence in the legislative history that Congress intended to exempt Amtrak from all payments to state and local governments, only from state and local taxes, whereas here, the payments are based on a consensual agreement between Amtrak's predecessors and the city for the use of real property.

Amtrak II, 882 F.2d at 714-15. As a result of this split between the circuits, Amtrak is required to contribute to

the maintenance or reconstruction of crossings, including bridges, in New York, but not in Pennsylvania, Delaware or New Jersey.

In *SEPTA I*, this court addressed the issue of whether SEPTA, a state agency that as a "commuter authority" is entitled to the same exemption as Amtrak under 45 U.S.C. § 581(c)(5), was exempt from the PUC's allocation of maintenance costs for a bridge which it owns and which carries a roadway over its tracks. Because this court had "fundamental differences with the Third Circuit's analysis" in *Amtrak I* that a special assessment is a tax, we made a thorough analysis of the nature of a crossing. Such analysis was absent from the Third Circuit's opinion. *SEPTA I*, 592 A.2d at 803.

In discussing the nature of the allocation of maintenance costs, we analyzed how crossing maintenance would be accomplished if the PUC did not carry out its legislative function—by private agreements or special legislation between the entities crossing each other's right-of-way with resort to actions for specific performance if one party does not fulfill its obligations. *Id.* at 803-804. The PUC's authority to allocate those costs was simply recognized by the General Assembly as a more rational way to ensure the safety of the public by a timely allocation of responsibility and initiating investigations; it is nonetheless based on the same common law principle that responsibility lies with those who own and use the crossing. *Id.* at 804. Because of the nature of the parties' relationship and because the PUC's involvement was legislated as a way to better maintain safety for the travelling public, the allocation of the costs of maintaining the bridge is like the rental fees paid in *Amtrak II*, and not a tax or fee of the kind for which Amtrak was intended to be exempt.[7]

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[7] The decision in *Consolidated Railroad Corporation v. Pennsylvania Public Utility Commission*, 671 A.2d 248 (Pa. Cmwlth. 1995), is not contrary to either *SEPTA I* or our holding in this

Undeterred by this court's holding that it could be liable, SEPTA sought a more favorable result in the federal courts by bringing an action to prevent the enforcement of three PUC orders allocating part of the costs of maintaining three highway bridges, owned by SEPTA, to it. *Southeastern Pennsylvania Transportation Authority v. Pennsylvania Public Utility Commission*, 826 F.Supp 1506 (E.D. Pa. 1993) (*SEPTA II*)[8] and *Southeastern Pennsylvania Transportation Authority v. Pennsylvania Public Utility Commission*, 802 F.Supp. 1273 (E.D. Pa. 1992). Ruling on the PUC's motion to dismiss, the District Court held that SEPTA, like Amtrak, is exempt because the allocation of maintenance responsibilities for the bridges is a tax or fee by the state. *Id.* at 1281. It reasoned that, because Congress intended to impose a passenger rail "user fee" on state and local governments, it would be inconsistent to require SEPTA to pay for "related local improvements in the many instances where the states could, and would, impose them". *Id.* at 1280. The District Court also stated that ownership of the bridge and whether the payments are for replacement or repair are immaterial because forced payments for local improvements constitute a tax within the meaning of the federal exemption. *Id.* at 1281 n.13.

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case. There, Conrail argued that it was allocated too much of the costs for the repair and maintenance of bridge crossing tracks used by both Amtrak and Conrail, because once the PUC found Amtrak exempt from paying those costs, the legislative intent of the exemption was that the governmental entities be allocated those costs, not a private company. Because only Conrail appealed, no issue was raised that the PUC erred in holding that Amtrak was exempt. We held first that the federal exemption does not apply, by its own terms, to exempt Conrail, and second, that Conrail, who possessed an easement in the right-of-way, ownership of the tracks and a leasehold interest in Amtrak's tracks, benefited from the crossing and was required to contribute a fair share to the maintenance as determined by the PUC. *Id.* at 252.

[8] *Affirmed per curiam*, 27 F.3d 558 (3rd Cir. 1994), *cert. denied*, —— U.S. ——, 115 S.Ct. 318 (1994).

Although footnoting this court's decision that SEPTA is not exempt from maintenance costs, unlike our in-depth analysis of the circuit courts' reasoning, the District Court did not address the reasoning of our decision stating "it is well understood that 'where a federal right is concerned we are not bound by the characterization given to a state tax by state courts or Legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted.' " *Id.* at 1279 n.10 (quoting *United States v. Allegheny County*, 322 U.S. 174, 184 (1943)). Subsequently, granting summary judgment to SEPTA and enjoining the PUC from allocating any costs of maintenance or repair of the bridges to SEPTA, the District Court stated that it is bound to consider the Third Circuit's determination "a fortiorari, more correct than contrary rulings by state courts" [9] and refused to withhold its jurisdiction based on SEPTA's forum shopping. *SEPTA II*, 826 F.2d at 1516 n.8.

After the federal courts' decisions relating to SEPTA's liability, the PUC and SEPTA entered into a consent decree wherein the PUC agreed to refrain from assessing upon SEPTA the cost of or responsibility for the construction, reconstruction, inspection, maintenance or repair of any highway bridge, and to reopen any proceedings within its jurisdiction where it had assessed SEPTA any of those costs and to reassign the cost to parties other than SEPTA. *Southeastern Pennsylvania Transportation Authority v. Pennsylvania Public Utility Commission*, No. 95-CV-4500 (E.D. Pa. filed January 19, 1996).

As the result of the federal cases, the extent of Amtrak's exemption under 45 U.S.C. § 546b, in relation to maintenance costs for a crossing, is muddled: the Second Circuit and the Pennsylvania courts consider such payments not to be a tax or fee but a continuing maintenance

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[9] Although the District Court is *a fortiorari* bound by the Third Circuit's determination, the Third Circuit's decision is not *a fortiorari* "more correct".

obligation, while the Third Circuit considers it a tax.[10] In an effort to convince the Third Circuit that our approach, and the Second Circuit's, is the better view (and absent convincing them, at least, prod them to address

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[10] Absent a pronouncement by the United States Supreme Court, decisions of the inferior federal courts are not binding on state courts. *Rader v. Pennsylvania Turnpike Commission*, 407 Pa. 609, 182 A.2d 199 (1962); *Lilley v. Johns-Manville Corporation*, 408 Pa. Superior Ct. 83, 596 A.2d 203 (1991), *petition for allowance of appeal denied*, 530 Pa. 644, 607 A.2d 254 (1992). There is no hierarchical arrangement between state courts and federal courts that exercise jurisdiction within that state. Under the federal system, the states possess sovereignty concurrent with that of the federal government. *New York v. United States*, 505 U.S. 144, 163 (1992). The Supreme Court stated in *Howlett v. Rose*, 496 U.S. 356, 372-73 (1990):

> Federal law is enforceable in state courts not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum—although both might well be true—but because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature. The Supremacy Clause makes those laws "the supreme Law of the Land," and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure. "The laws of the United State are laws in the several States, and just as much binding on the citizens and court thereof as the State laws are. . . . The two together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent."

(Quoting *Flaflin v. Houseman*, 93 U.S. 130, 136-37 (1876)). Accordingly, state courts share responsibility for the application and enforcement of federal law. *Howlett*, 496 U.S. at 372-73.

Although having concurrent rather than subordinate jurisdiction to decide the issue of federal law before us, we would nonetheless normally find the Third Circuit decision of great probity in interpreting the federal statute. However, that does not hold true when there is a circuit court split and our own analysis reveals that the Third Circuit is clearly wrong.

our analysis), we will again revisit the PUC's role in allocating costs of maintaining utility crossings, which is one of ensuring the public safety not being a tax collector.

B. *Historical Basis of the PUC's Jurisdiction to Allocate Costs*

At common law, when a private corporation constructed a railroad which made a bridge necessary at the crossing of a highway, imposed on the private corporation was the duty not only of constructing the bridge but also of maintaining the bridge to enable the public to safely use the highway. Elliott, The Law of Roads and Streets, § 41 (2d ed. 1900). *See Smith v. Pennsylvania Railroad Company*, 201 Pa. 131, 50 A. 829 (1901). This common law duty was considered an imperative one and could be enforced by mandamus. Elliott, *supra* at § 41. If the railroad company refused to perform its duty to keep a crossing in repair, the municipality where the crossing was located could repair it and recover the cost of those repairs from the railroad company by bringing an action in court. *Id.* at § 785. *Pittsburgh, Virginia & Charleston Railway Company v. Commonwealth*, 101 Pa. 192 (1882).

During the same period, highways, roads and streets were placed under the control of the municipalities through which they ran and the state withdrew from actively building and from maintaining those highways, roads and streets. *Westmoreland Chemical & Color Company v. Public Service Commission*, 292 Pa. 451, 144 A. 407 (1928). Once the municipalities had control over the roads within their borders, the responsibility for maintenance was assigned in agreements between the municipalities and the railroad companies as part of the municipalities' agreement to the placement of the crossings. *SEPTA I*, 592 A.2d at 803.[11] If either party failed to fulfill its

[11] Additionally, where one utility crossed another, special legislation, through the exercise of police powers, could approve the crossing and establish construction and maintenance responsibilities

part of the agreement, the other party could seek to compel performance of maintenance responsibilities. *Id.* at 804. "This situation is analogous to a common driveway with shared maintenance responsibilities where if one party does not perform or agree to reconstruction, the other party can sue for specific performance." *Id.*

The greatest area of controversy related to highway-railroad crossings at the turn of the century was at-grade crossings. The legislature, concerned with public safety, encouraged the abolishment of grade crossings first by empowering the railroad companies themselves to do it with oversight by the courts. *Westmoreland Chemical & Color,* 294 Pa. at 463, 144 A. at 409.[12] The courts, when faced with determining whether a new at-grade crossing would be allowed due to "imperious necessity",[13] lamented their inability to determine how crossings should

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to ensure the safety and convenience of the public. Elliott, *supra* at § 778. *See Minersville Borough v. Schuylkill Electric Railway Company,* 205 Pa. 394, 54 A. 1050 (1903).

[12] In *Perry County Railroad Extension Company v. Newport & Sherman's Val. Railroad Company,* 150 Pa. 193, 199 (1892), the Supreme Court stated:

> The time for grade crossings in this state has passed. They ought not to be permitted, except in case of imperious necessity. They admittedly involve great danger to life and property. In the earlier period of railroads this danger was overlooked, or, at least, disregarded. The desire of the people for this species of improvements tended to close their eyes to the dangers involved. The traffic then upon railroads was comparatively light, and trains ran at long intervals. The rapid development of the country, the enormous growth in wealth, population and business, has materially changed the relations of railroads to the public and to each other. The result is that we now see railroad companies and municipalities spending enormous sums in correcting the defects of earlier railroad construction, and especially in avoiding grade crossings.

[13] The courts' jurisdiction over such questions was given by the Act of June 19, 1871, P.L. 1360, *formerly* 15 P.S. § 117, repealed by Section 2(a) of the Act of April 28, 1978, P.L. 202.

be made or how to equitably apportion the expense among those interested. *Chester Traction Company v. Philadelphia, Wilmington & Baltimore Railroad Company,* 188 Pa. 105, 41 A. 449 (1898). In 1913, the legislature created the Public Service Commission [14] and conferred upon it jurisdiction over the abolishment, relocation or repair of grade crossings. The General Assembly recognized that to ensure the public safety, a more rational method of ensuring that obligations to keep crossings safe was needed. *SEPTA I,* 592 A.2d at 804. The legislation conformed with the common law duty on the railroad companies to ensure the public safety but added that the municipalities involved may be required to contribute to the cost of new crossings as a whole:

> That a railroad company may be compelled to contribute to the abandonment or abolishing of a grade

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[14] With the enactment of the Public Service Company Law in 1913, Act of July 26, 1913, P.L. 1374, *formerly,* 66 P.S. §§ 571-577, repealed by the Act of May 28, 1937, P.L. 1053, the State exerted its police power through regulatory controls over public utilities, giving the Public Service Commission modified but exclusive jurisdiction over the construction of rail-highway crossings and the abolishment of dangerous conditions. *Westmoreland Chemical & Color,* 294 Pa. at 457, 144 A. at 408. Section 12 of the Public Service Company Law stated that the expenses of the relocation, alteration or abolition of any crossing:

> shall be borne and paid, as hereinafter provided, by the public service company or companies or municipal corporations concerned, or by the Commonwealth, either severally or in such proper proportions as the Commission may, . . . determine.

However, if the parties came to an agreement about the payment for such changes and then defaulted on the agreement, the Commission was empowered to contract for the work to be done and then to recover the costs "as debts of like amount are now by law recoverable, from the public service company or companies" in the proportions determined by the Commission. Section 12 of the Act of July 26, 1913, P.L. 1374. Section 12 was replaced by Section 411 of the Public Utility Law of 1937, Act of May 28, 1937, P.L. 1053, *formerly,* 66 P.S. § 1181, repealed by the Act of July 1, 1978, P.L. 598.

> crossing without invasion of its right under the Fourteenth Amendment to the Constitution of the United States is also clear. . . . The extent of this contribution would be the cost of the structure in its entirety, which includes the approaches and damages to property injured by the change of grade. The State, through the commission, may lawfully require the expense to be paid either by the railroad company or the county, township or municipality where the crossing is situated, jointly or in several allotments as their interest or benefit may determine.

Westmoreland Chemical & Color, 294 Pa. at 463-64, 144 A. at 409 (citations omitted). The cost of approaches and damage to the property of private persons aside, like under the common law, the legislature could have demanded the railroad companies to replace at-grade crossings at its own cost. However, recognizing a benefit to the municipalities affected, the legislature permitted an allocation of costs to those parties, as well as the railroad companies.

Presently, the Public Utility Code establishes that the PUC [15] is required to ensure the public safety, not only by requiring maintenance on bridges, but also by, for example, emergency closings, investigating crossings and ordering the installation of lights or rails. 66 Pa. C.S. § 2702. However, none of these costs, including the imposition of maintenance costs here, are paid to the government or used to support general government obligations. As we stated in *SEPTA I*, the money from the PUC's imposition of maintenance costs:

> [I]s used to ensure that those who benefit from the crossing or who share that easement maintain it in

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[15] In enacting the Code and creating the PUC, the legislature sought to establish a statewide standardization of all facets of the operation of public utilities under the governance of the PUC. *City of Philadelphia v. Philadelphia Electric Company*, 504 Pa. 312, 473 A.2d 997 (1984). In doing so, it did not effect a change in the PUC's power to allocate costs. *Id.* at 322, 473 A.2d at 1002.

> a safe manner for the travelling public. The task which the PUC performs is not imposing a new responsibility on parties who benefit from the crossing, but in essence, only requires the parties to perform maintenance responsibilities that they would have [performed] even if the PUC did not impose them, because at common law or under legislation authorizing the construction of those facilities, the parties would still have those obligations. Akin to adjoining property owners responsibility for the maintenance of a "common driveway," the parties benefiting from a crossing always have the responsibility to maintain it, irrespective of how that maintenance is accomplished.

SEPTA I, 592 A.2d at 804.

C. *Tax or Fee*

In determining whether the PUC erred in refusing to allocate costs to Amtrak for maintaining the 41st Street Bridge, we believe it is incumbent upon this court to consider the nature of the allocation permitted by the Public Utility Code. The PUC argued that it cannot comply with both the state case law, *SEPTA I*, and the federal case law, including the federal court's imposition of costs and the consent decree.[16] While somewhat sympathetic, we believe the decision in *SEPTA I* is clearly controlling and we are compelled to hold that the PUC erred in not considering Amtrak when allocating the costs of reconstructing the 41st Street Bridge.

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[16] The PUC entry into a consent decree is problematic. The municipalities or private entities could make valid arguments that neither the federal courts or this court has considered. By entering into the consent decree agreeing not to allocate any costs to SEPTA, the PUC has prejudged those arguments and deprives those parties of their due process right to a full and fair hearing. Of course, we are not bound by the consent decree.

The allocation of the costs of maintaining a highway-roadway crossing by the PUC is simply a determination of how those who benefit from the crossing will incur costs they would have had at common law and is not a tax or fee. The classic tax is "imposed by a legislature upon many, or all citizens . . . raises money, contributed to a general fund, and spent for the benefit of the entire community". *CNW v. San Juan Cellular Telephone Co. v. Public Service Commission of Puerto Rico*, 967 F.2d 683 (1st Cir. 1992). A tax is an "enforced contribution to provide for the support of government". *United States v. LaFranca*, 282 U.S. 568 (1931). Where a charge is imposed by a state or municipality not in its capacity as a sovereign but rather under a voluntary, contractual relationship, it has been held not to be a tax. *United States v. City of Columbia, Missouri*, 914 F.2d 151, 156 (8th Cir. 1990). A "fee" is paid to a public agency for bestowing a benefit which is not shared by the general members of the community and is paid by choice. *City of Vanceburg, Kentucky v. Federal Energy Regulatory Commission*, 571 F.2d 630, 644 (D.C. Cir. 1977), *cert. denied*, 439 U.S. 818 (1978). The Supreme Court distinguished taxes and fees in *National Cable Television Association v. United States*, 415 U.S. 336, 340 (1974):

> Taxation is a legislative function, and [a legislature] . . . may act arbitrarily and disregard benefits bestowed by [a g]overnment on a taxpayer and go solely on ability to pay. . . . A fee, however, is incident to a voluntary act, e.g., a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station.

The PUC's allocation of costs does not meet the definition of a tax: it is not a legislative function; it does not disregard benefits to the railroad; it is not a revenue-raising method imposed on a class of similarly situated parties; and, it is not intended for general public benefit.

Nor is it a fee charged for a specific benefit by a public agency.[17] Instead, the allocation was intended to be a timely, fair method of ensuring the safety of the public by those responsible for the crossing. Illustrating most vividly that it is not a tax or fee, the PUC can order the Commonwealth and local governments to pay private bodies for reconstruction or maintenance of crossings; whoever heard of a tax or fee that governments pay to private entities?

Without the PUC's intervention providing a reliable, orderly process, the public would have to rely on the railroad companies' voluntary fulfillment of its common law duty to maintain the bridges necessitated by their railroad tracks, with the only enforcement through the courts. These are the same costs incurred at common law, and the PUC's allocation based on intrinsic benefit does not make it a tax or fee. "The PUC's imposition of maintenance costs on the parties who benefit from the crossing in no way meets the test of what is to be considered a tax as set forth by the Supreme Court in

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[17] We believe that the legislative history restricts the term "fee" to payments that are like taxes. As discussed in *Amtrak II*, 882 F.2d at 714-15, the committee report stated that the legislation was intended to exempt Amtrak from paying "property taxes, income and franchise taxes, sales taxes, gross revenue taxes, fuel taxes, licenses and other fees," and that "it is not the Committee's desire to exempt Amtrak from the payment of fees for services used, such as water and sewer, just as the United States is not exempt from the payment of such fees." H.R. Rep. No. 81, 97th Cong., 1st Sess. 19, 21 (1981). Under the principle of *ejusdem generis*, the general term "other fees" must be interpreted to be limited by the specific types of taxes that precedes it to include only those payments of the same general kind or class as those specifically mentioned. *See* Black's Law Dictionary 464 (5th ed. 1979). Moreover, the committee report stated that Amtrak should be exempt only "to the same extent as the United States is exempt from the payment of such taxes or other fees"; therefore, it should not be exempt from all payments to state and local governments, such as special assessments, only from state and local taxes. *See Amtrak II*.

National Cable and by the Second Circuit [in *Amtrak II*], where it was found that a tax is where a payment is imposed, regardless of the benefits received." *SEPTA I*, 592 A.2d at 804.[18]

Even if the PUC's allocation of costs is considered a "special assessment," [19] as it was by the Third Circuit in *Amtrak I*, it is not a tax or fee from which Amtrak would be exempt because in Pennsylvania, such "special assessments" are the burden or benefits one bears or receives incidental to one's ownership of land, not a tax or fee to support the public welfare. *SEPTA I*, 592 A.2d at 803 n.12; *Evans v. West Norriton Township Municipal Authority*, 370 Pa. 150, 155-56, 87 A.2d 474, 477 (1952); *Harrisburg v. Cemetery Association*, 293 Pa. 390, 394,

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[18] In this case, Amtrak clearly owns the bridge, which was constructed and owned by Pennsylvania Railroad pursuant to the 1927 agreement, (R.R. 247a-248a), and transferred through deeds to Amtrak. (R.R. 190a-227a). Contrary to the District Court's assertion in *SEPTA II*, 826 F.Supp. at 1526, ownership of the bridge is not a "distinction without a difference". The District Court reaches this conclusion due to the absence of discussion of ownerhip in *Amtrak I*, wherein it is never indicated that Amtrak owned the bridge at issue, and its assertion that the PUC does not stress ownership in allocating costs because SEPTA could be allocated costs from bridges it does not own. The District Court ignores that the PUC is required to determine the interested parties that benefit from a crossing, resulting in a spreading of costs among those served by the crossing, but that ownerhip is clearly one of the factors considered to determine benefit, as recognized in the District Court's *Amtrak I* opinion, 665 F.Supp. at 403 n.3.

[19] Under Pennsylvania law, special assessments for linear improvements are made on the basis of who receives the benefits. *City of Philadelphia v. Philadelphia Transportation Authority*, 345 Pa. 244, 26 A.2d 909 (1942). An assessment cannot be imposed on property not, in fact, receiving a benefit. *Riehl v. Milcreek Township*, 64 Pa. Commonwealth Ct. 513, 441 A.2d 466 (1982).

SEPTA I, 592 A.2d at 803 n.12.

143 A. 111, 112 (1928); *see also Illinois Central Railroad Company v. City of Decatur*, 147 U.S. 190 (1893).[20]

Because the costs of repairing and maintaining the 41st Street Bridge are not a "tax" or "fee" from which Amtrak would be exempt, we vacate the PUC order and remand for it to make a new allocation of costs considering all parties, including Amtrak.[21] We retain jurisdiction.

/s/ Dan Pellegrini
DAN PELLEGRINI
Judge

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[20] The difference between special assessments and taxes has been well settled in Pennsylvania:

> It is true that general taxation and these local assessments have their basis in the taxing power, but there the similarity ends. Payment of the former results in no return to the treasury; while in nearly every instance, all that is expended for the latter, and, not infrequently, much more, comes back when the property is sold. The former had no basis in contract and is limited only by the necessities of the government; the latter is quasi-contractual and is expressly limited to the benefits accruing to the property affected. These distinctions . . . "have been recognized and stated by the courts of almost every state in the Union."

Philadelphia v. United States Housing Corporation, 280 Pa. 417, 422, 124 A. 669, 670-71 (1924) (quoting *Illinois Central Railroad Co.*).

[21] Because it is necessary to remand for a new allocation of costs including Amtrak, we need not address the City's and Conrail's remaining contentions.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 1999 C.D. 1995

CITY OF PHILADELPHIA,
Petitioner

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Respondent

No. 2100 C.D. 1995

CONSOLIDATED RAIL CORPORATION,
Petitioner

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Respondent

ORDER

AND NOW, this 24th day of May, 1996, the order of the Pennsylvania Public Utility Commission, dated March 31, 1995, No. I-00930028, is vacated, and the case is remanded to the Pennsylvania Public Utility Commission to apportion costs for the planning, repair and maintenance of the bridge between the present parties and the National Railroad Passenger Corporation, in accordance with the foregoing opinion. We will retain jurisdiction until this is accomplished.

/s/ Dan Pellegrini
DAN PELLEGRINI
Judge

APPENDIX C

STATUTORY PROVISIONS

49 U.S.C. § 24301

§ 24301. Status and applicable laws

(a) Status.—Amtrak—

(1) is a rail carrier under section 10102 of this title;

(2) shall be operated and managed as a for-profit corporation; and

(3) is not a department, agency, or instrumentality of the United States Government.

(b) Principal office and place of business.—The principal office and place of business of Amtrak are in the District of Columbia. Amtrak is qualified to do business in each State in which Amtrak carries out an activity authorized under this part. Amtrak shall accept service of process by certified mail addressed to the secretary of Amtrak at its principal office and place of business. Amtrak is a citizen only of the District of Columbia when deciding original jurisdiction of the district courts of the Unted States in a civil action.

(c) Application of subtitle IV.—(1) Part A of subtitle IV of this title applies to Amtrak, except for provisions related to the—

(A) regulation of rates;

(B) abandonment or extension of rail lines used only for passenger transportation and the abandonment or extension of operations over those lines;

(C) regulation of routes and service;

(D) discontinuance or change of rail passenger transportation operations; and

(E) issuance of securities or the assumption of an obligation or liability related to the securities of others.

(2) Notwithstanding this subsection—

(A) section 10721 of this title applies to Amtrak; and

(B) on application of an adversely affected motor carrier, the Surface Transportation Board under part A of subtitle IV of this title may hear a complaint about an unfair or predatory rate or marketing practice of Amtrak for a route or service operating at a loss.

(d) Application of safety and employee relations laws and regulations.—Laws and regulations governing safety, employee representation for collective bargaining purposes, the handling of disputes between carriers and employees, employee retirement, annuity, and unemployment systems, and other dealings with employees that apply to a rail carrier subject to part A of subtitle IV of this title apply to Amtrak.

(e) Application of certain additional laws.—Section 552 of title 5, this part, and, to the extent consistent with this part, the District of Columbia Business Corporation Act (D.C. Code § 29-301 et seq.) apply to Amtrak.

(f) Laws governing leases and contracts.—The laws of the District of Columbia govern leases and contracts of Amtrak, regardless of where they are executed.

(g) Nonapplication of rate, route, and service laws.—A State or other law related to rates, routes, or service does not apply to Amtrak in connection with rail passenger transportation.

(h) Nonapplication of pay period laws.—A State or local law related to pay periods or days for payment of employees does not apply to Amtrak. Except when otherwise provided under a collective bargaining agreement, an

employee of Amtrak shall be paid at least as frequently as the employee was paid on October 1, 1979.

(i) Preemption related to employee work requirements.—A State may not adopt or continue in force a law, rule, regulation, order, or standard requiring Amtrak to employ a specified number of individuals to perform a particular task, function, or operation.

(j) Nonapplication of laws on joint use or operation of facilities and equipment.—Prohibitions of law applicable to an agreement for the joint use or operation of facilities and equipment necessary to provide quick and efficient rail passenger transportation do not apply to a person making an agreement with Amtrak to the extent necessary to allow the person to make and carry out obligations under the agreement.

(k) Exemption from additional taxes. —(1) In this subsection—

(A) "additional tax" means a tax or fee—

(i) on the acquisition, improvement, ownership, or operation of personal property by Amtrak; and

(ii) on real property, except a tax or fee on the acquisition of real property or on the value of real property not attributable to improvements made, or the operation of those improvements, by Amtrak.

(B) "Amtrak" includes a rail carrier subsidiary of Amtrak and a lessor or lessee of Amtrak or one of its rail carrier subsidiaries.

(2) Amtrak is not required to pay an additional tax because of an expenditure to acquire or improve real property, equipment, a facility, or right-of-way material or structures used in providing rail passenger transportation, even if that use is indirect.

(*l*) Exemption from taxes levied after September 30, 1981.—(1) Amtrak or a rail carrier subsidiary of Am-

trak is exempt from a tax or fee imposed by a State, a political subdivision of a State, or a local taxing authority and levied on it after September 30, 1981. However, Amtrak is not exempt under this subsection from a tax or fee that it was required to pay as of September 10, 1982.

(2) The district courts of the United States have original jurisdiction over a civil action Amtrak brings to enforce this subsection and may grant equitable or declaratory relief requested by Amtrak.

(m) Waste disposal.—(1) An intercity rail passenger car manufactured after October 14, 1990, shall be built to provide for the discharge of human waste only at a servicing facility. Amtrak shall retrofit each of its intercity rail passenger cars that was manufactured after May 1, 1971, and before October 15, 1990, with a human waste disposal system that provides for the discharge of human waste only at a servicing facility. Subject to appropriations—

(A) the retrofit program shall be completed not later than October 15, 1996; and

(B) a car that does not provide for the discharge of human waste only at a servicing facility shall be removed from service after that date.

(2) Section 361 of the Public Health Service Act (42 U.S.C. 264) and other laws of the United States, States, and local governments do not apply to waste disposal from rail carrier vehicles operated in intercity rail passenger transportation. The district courts of the United States have original jurisdiction over a civil action Amtrak brings to enforce this paragraph and may grant equitable or declaratory relief requested by Amtrak.

(n) Rail transportation treated equally.—When authorizing transportation in the continental United States for an officer, employee, or member of the uniformed services of a department, agency, or instrumentality of

the Government, the head of that department, agency, or instrumentality shall consider rail transportation (including transportation by extra-fare trains) the same as transportation by another authorized mode. The Administrator of General Services shall include Amtrak in the contract air program of the Administrator in markets in which transportation provided by Amtrak is competitive with other carriers on fares and total trip times.

(Added Pub.L. 103-272, § 1(e), July 5, 1994, 108 Stat. 904, and amended Pub.L. 104-88, Title III, § 308(g), Dec. 29, 1995, 109 Stat. 947.)

66 Pa.C.S. § 2702

§ 2702. Construction, relocation, suspension and abolition of crossings

(a) General rule.—No public utility, engaged in the transportation of passengers or property, shall, without prior order of the commission, construct its facilities across the facilities of any other such public utility or across any highway at grade or above or below grade, or at the same or different levels; and no highway, without like order, shall be so constructed across the facilities of any such public utility, and, without like order, no such crossing heretofore or hereafter constructed shall be altered, relocated, suspended or abolished.

(b) Acquisition of property and regulation of crossing.—The commission is hereby vested with exclusive power to appropriate property for any such crossing, except as to such property as has been or may hereafter be condemned by the Department of Transportation for projects financed entirely by the Commonwealth and for Federal Air Projects under section 1004 of the act of June 1, 1945 (P.L. 1242, No. 428), known as the "State Highway Law," [1] in which case the provisions of

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[1] 36 P.S. § 670—1004.

that statute shall be in effect, and to determine and prescribe, by regulation or order, the points at which, and the manner in which, such crossing may be constructed, altered, relocated, suspended or abolished, and the manner and conditions in or under which such crossings shall be maintained, operated, and protected to effectuate the prevention of accidents and the promotion of the safety of the public. The commission shall require every railroad the right-of-way of which crosses a public highway at grade to cut or otherwise control the growth of brush and weeds upon property owned by the railroad within 200 feet of such crossing on both sides and in both directions so as to insure proper visibility by motorists.

(c) Mandatory relocation, alteration, suspension or abolition.—Upon its own motion or upon complaint, the commission shall have exclusive power after hearing, upon notice to all parties in interest, including the owners of adjacent property, to order any such crossing heretofore or hereafter constructed to be relocated or altered, or to be suspended or abolished upon such reasonable terms and conditions as shall be prescribed by the commission. In determining the plans and specifications for any such crossing, the commission may lay out, establish, and open such new highways as, in its opinion, may be necessary to connect such crossing with any existing highway, or make such crossing more available to public use; and may abandon or vacate such highways or portions of highways as, in the opinion of the commission, may be rendered unnecessary for public use by the construction, relocation, or abandonment of any of such crossings. The commission may order the work of construction, relocation, alteration, protection, suspension or abolition of any crossing aforesaid to be performed in whole or in part by any public utility or municipal corporation concerned or by the Commonwealth.

(d) Procedure for appropriation of property.—When any real property is appropriated by the commission under this section, each parcel of such property so appropriated,

shall be accurately described by metes and bounds, and the record owner of each such parcel shall be named in the order of appropriation. Unless otherwise recorded, the commission shall file with the recorder of deeds of the proper county, a copy of that portion of the order of the commission which appropriates such property, and such plans and other detailed information as the commission may deem necessary. Such portion of the commission's order dealing with the specific property appropriated shall be recorded and indexed under the name or names of the record owners of such specific property at the expense of the utility or utilities, political subdivision, municipality or municipalities, governmental agency, including the Department of Transportation and Public Utility Commission, corporation or persons upon whose instigation, petition or complaint the said crossing was constructed, reconstructed, relocated, altered, suspended or abolished, as may be ordered, to bear such expense or recording by the commission. When such appropriation of real property has been recorded under the provisions of any other statute, such recording shall not be duplicated under the terms of this subsection.

(e) Reactivation.—The commission may, within its discretion upon petition by any railroad, the Commonwealth, a political subdivision or any other affected party by order reactivate any crossing suspended under this section.

(f) Danger to safety.—Upon the commission's finding of an immediate danger to the safety and welfare of the public at any such crossing, the commission shall order the crossing to be immediately altered, improved, or suspended. Thereafter hearing shall be held and costs shall be allocated in the manner prescribed in this part.

(g) Suspensions.—Any order of suspension under this section shall require the following for the protection of the motoring public:

(1) Removal or covering of crossing warning devices.

(2) (i) Paving over the tracks; or

(ii) removal of the tracks and paving over of the area formerly occupied by said tracks; or

(iii) barricading the crossing.

1978, July 1, P.L. 598, No. 116, § 1, effective in 60 days.

66 Pa.C.S. § 2704

§ 2704. Compensation for damages occasioned by construction, relocation or abolition of crossings

(a) General rule.—The compensation for damages which the owners of adjacent property taken, injured, or destroyed may sustain in the construction, relocation, alteration, protection, or abolition of any crossing under the provisions of this part, shall, after due notice and hearing, be ascertained and determined by the commission. Such compensation, as well as the cost of construction, relocation, alteration, protection, or abolition of such crossing, and of facilities at or adjacent to such crossing which are used in any kind of public utility service, shall be borne and paid, as provided in this section, by the public utilities or municipal corporations concerned, or by the Commonwealth, in such proper proportions as the commission may, after due notice and hearing, determine, unless such proportions are mutually agreed upon and paid by the interested parties.

(b) Judicial review.—Any party to the proceeding dissatisfied with the determination of the commission may appeal therefrom, as provided by law, and for this purpose is hereby authorized to sue the Commonwealth. The commission may, of its own motion, or upon application of any party in interest, submit to the court of common pleas of the county wherein the property affected is located, the determination of the amount of damages to any property owner due to such condemnation, for which purpose such court shall appoint viewers, from whose award of damages

on appeal to said court shall lie on the part of any person or party aggrieved thereby, under the general law applicable to the appointment of viewers, for the ascertainment of damages due to the condemnation of private property for public use.

(c) Payment of compensation.—The amount of damages or compensation determined and awarded to be paid the owners of adjacent property by the Commonwealth shall, in each instance, be paid by the State Treasurer, on a warrant drawn by the State Treasurer, upon the presentation to that officer of a statement setting forth the amount determined to be paid as aforesaid, duly certified by the commission; such payment to be paid out of any funds specifically appropriated for the improvement of the roads or highways of this Commonwealth; and in case of a verdict and judgment thereon for the damages or compensation, recorded by any such adjacent property owners upon appeal, the same shall be paid out of any funds appropriated as aforesaid; and any court of common pleas hearing and determining such appeal is hereby authorized and empowered to issue a writ of mandamus to such commission and the State Treasurer, or either of them, as the case may require, for the payment of such judgment.

(d) Recovery of compensation.—The commission shall have the right to recover, for and on behalf of the Commonwealth, by due process of law, as debts of like amount are now by law recoverable, from the public utility or municipal corporation concerned, in such amounts or proportions against each as may be determined by the commission, as hereinbefore provided in this section, the amount of the damages or compensation awarded to the owners of adjacent property by the commission, or by the court, and the amounts so received shall be paid into the State Treasury, through the Department of Revenue, to the credit of the Motor License Fund.

1978, July 1, P.L. 598, No. 116, § 1, effective in 60 days.

APPENDIX D

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

Nos. 87-1445, 87-1446

NATIONAL RAILROAD PASSENGER CORPORATION

v.

COMMONWEALTH OF PENNSYLVANIA PUBLIC UTILITY COMMISSION and TOWNSHIP OF TREDYFFRIN

Appeal of Township of Tredyffrin

Appeal of Commonwealth of Pensylvania
Public Utility Commission

Argued March 7, 1988

Decided June 6, 1988

As Amended June 21, 1988

Before WEIS, GREENBERG and ALDISERT, Circuit Judges.

OPINION OF THE COURT

WEIS, Circuit Judge*

Congress granted Amtrak an exemption from "any taxes or other fees imposed by any State." 45 U.S.C. § 546b. On this appeal, we consider whether that statute

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* At the time of oral argument on this case, the Honorable Joseph F. Weis, Jr., was an active circuit judge. Since that time, Judge Weis has assumed senior status.

covers a special assessment levied by a state agency for the construction of railroad grade crossing improvements. The district court held the exemption applied and entered summary judgment sustaining Amtrak's challenge to the assessment. We will affirm.

The pertinent facts are not in dispute. Following state administrative proceedings, the Pennsylvania Public Utility Commission directed Amtrak to pay approximately twenty percent of the cost of replacing a bridge situated in Tredyffrin Township, Pennsylvania. The existing bridge, constructed in 1899 by the Pennsylvania Railroad Company, carries Cassatt Avenue over tracks owned and presently used by the National Railroad Passenger Corporation (Amtrak).[1] The remaining eighty percent of the reconstruction expense was allocated to Tredyffrin Township which, in turn, would be reimbursed by the state. The Commission also ordered Amtrak to assume certain maintenance costs of the proposed new bridge and adjoining pedestrian walkway.

Amtrak challenged the Commission's order as inconsistent with the tax exemption granted it by Congress in 45 U.S.C. § 546b. The Commission rejected this argument *sub silentio.* Amtrak then sought declaratory and injunctive relief in the district court. Both parties filed cross-motions for summary judgment.

Reviewing the legislative history of Amtrak's tax exemption, the district court determined that the statute was designed to "guarantee Amtrak's fiscal integrity, and indeed its survival." *National R.R. Passenger Corp. v.*

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[1] The district court noted that freight trains operated by the Consolidated Rail Corporation (Conrail) and commuter trains operated by the Southeastern Pennsylvania Transportation Authority (SEPTA) also use these tracks. However, both operators pay Amtrak for the right to use its rails. *National R.R. Passenger Corp. v. Pennsylvania Pub. Util. Comm'n,* 665 F.Supp. 402, 404 n. 4 (E.D.Pa.1987).

Pennsylvania Pub. Util. Comm'n, 665 F.Supp. 402, 411 (E.D.Pa. 1987). The Act creating Amtrak demonstrated "a federal commitment to maintain and improve rail passenger service, federal controls over Amtrak management and operations and federal financial support for Amtrak." *Id.*

Against this background, the court decided that it "would be inappropriate to undermine those goals through the too stingy construction of the exemption offered by defendants." *Id.* Holding that the statutory exemption found in section 546b included an order by the Commission to pay an assessment, the court entered judgment for Amtrak. The Township and Commission defendants both appealed, and their cases were consolidated.

Defendants mount two arguments. First, they contend that the Commission's assessment was a valid exercise of the state's police power to enforce safety at grade crossings. Alternatively, they argue that the assessment is not a tax within the meaning of section 546b. The district court rejected the police power—safety argument as being "of no moment." We agree. The issue in this case does not hinge on the power of the state to enforce safety measures at grade crossings, and plaintiff does not challenge the state's authority in that area. Rather, the dispositive question is whether the federal statute at issue here exempts Amtrak from underwriting the safety measures the Commission ordered. The answer rests on statutory construction.

The conditions which prompted Congress' creation of Amtrak were described by the Supreme Court in *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.,* 470 U.S. 451, 453-57, 105 S.Ct. 1441, 1445-47, 84 L.Ed.2d 432 (1985). In 1929, approximately 20,000 intercity trains rode the rails in this country. That number diminished to about 11,000 in 1946 and, by 1971, to fewer than 500. Those railroads which continued to carry passengers incurred heavy and continuing losses,

prompting requests for regulatory approval to discontinue service. The passenger coach, once a vibrant force in American cultural and economic life, seemed destined to take its place in the transportation museum alongside the stagecoach and side-wheeler.

In an effort to revive the failing intercity passenger lines, Congress enacted the Rail Passenger Services Act in 1971, 45 U.S.C. §§ 501-658, establishing the National Railroad Passenger Corporation, a private corporation better known by its official nickname "Amtrak." The Corporation is not "an agency or establishment" of the federal government, but is authorized by the government to provide intercity rail passenger service. *Atchison, Topeka & Sante Fe Ry.*, 470 U.S. at 454-55, 105 S.Ct. at 1445-46.

Despite massive federal subsidies, Amtrak's financial picture was bleak. In 1979, Congress directed the Secretary of Transportation to study Amtrak's liability for payment of taxes to state and local governments. In his 1980 report, the Secretary estimated that these taxes would cost Amtrak more than $14 million in the next year. S.Rep.No. 253, 97th Cong., 1st Sess. 103 (1981). The Secretary concluded that "State and local taxes on a primarily Federal investment are inappropriate." *Id.*

The Senate Appropriations Committee agreed, reasoning that "such taxation serves to erode the revenue-to-cost ratios which impact on whether States and localities continue to receive the benefits of Amtrak service." *Id.* The Committee disapproved the process through which federal subsidies were used to provide tax windfalls to states and localities. Subsequently, Congress deferred for one year Amtrak's payment of any state or local taxes. Pub. L. No. 97-102, 95 Stat. 1442, 1451 (1981).

Congress reviewed the matter again the following year and converted Amtrak's temporary exemption into a continuing one. A Senate Committee Report commented that

"there are many parts of the country which would gladly pay an amount equal to local or State taxes owed by Amtrak in order to have the benefit of Amtrak service." S. Rep. No. 516, 97th Cong., 2d Sess. 170 (1982), *quoted in National R.R. Passenger Corp. v. New Castle County*, 633 F.Supp. 354, 357 (D.Del.1986). The Report concluded: "At a time when local jurisdictions are demanding that nationwide rail passenger service be maintained, it seems reasonable to provide for a 'user contribution' whereby those areas receiving the service in turn contribute to Amtrak's continued existence through tax relief." *Id., quoted in New Castle County*, 633 F.Supp. at 358.

The applicable statutory provision, codified at 45 U.S.C. § 546b, reads: "Notwithstanding any other provision of law, the National Railroad Passenger Corporation (the 'Corporation') shall be exempt from any taxes or other fees imposed by any State, political subdivision of a State, or local taxing authority which are levied on the Corporation, or any railroad subsidiary thereof, from and after October 1, 1981. . . ."

The precise issue here is whether the phrase "any taxes or other fees" contained in this statute covers charges of the nature levied against Amtrak for building and maintaining the Cassatt Avenue bridge. Although not so labeled, the payments demanded of Amtrak in this case are similar to "special assessments" exacted by local municipalities to finance such projects as the construction and upkeep of streets, sidewalks, and sewers. Whether such "special assessments" will be construed as "taxes" depends on the context in which the terms are raised.

In *Robinson Protective Alarm Co. v. City of Philadelphia*, 581 F.2d 371 (3d Cir.1978), we decided that the phrase "any tax" in the Tax Injunction Act, 28 U.S.C. § 1341, must be interpreted to include a Philadelphia ordinance imposing a special assessment on users of the City's underground alarm system wires. In reaching our

conclusion, we explained that the meaning of the word "tax" was a matter of federal law deduced from congressional policy underlying the statute, rather than from state tax labels developed in an entirely unrelated legal context. *Id.* at 374. *Accord Wright v. McClain,* 835 F.2d 143, 144 (6th Cir.1987). *See also Carpenter v. Shaw,* 280 U.S. 363, 367-68, 50 S.Ct. 121, 122-23, 74 L.Ed. 478 (1930); *Tramel v. Schrader,* 505 F.2d 1310, 1314-16 (5th Cir. 1975).

However, the Court of Appeals for the Eighth Circuit, in constricting the Federal Reserve Bank's waiver of immunity from local taxes "except taxes upon real estate," 12 U.S.C. § 531, held that a special assessment would not qualify as a real estate "tax". *Federal Reserve Bank v. Metrocentre Improvement Dist. No. 1,* 657 F.2d 183 (8th Cir.1981), *aff'd,* 455 U.S. 995, 102 S.Ct. 1625, 71 L.Ed.2d 857 (1982). The court stated that "where there is federal immunity from taxation, Congress must express a clear, express, and affirmative desire to waive that exemption." *Id.* at 186. Although not entitled to immunity from "taxes on real estate," the Federal Reserve bank as an instrumentality of the United States government would enjoy an exemption from local "assessments". *Id.* at 186-87. *See John K. & Catherine S. Mullen Benevolent Corp. v. United States,* 290 U.S. 89, 54 S.Ct. 38, 78 L.Ed. 192 (1933); *United States v. City of Adair,* 539 F.2d 1185 (8th Cir.1976), *cert. denied,* 429 U.S. 1121, 97 S.Ct. 1157, 51 L.Ed.2d 571 (1977).

Still another variation on this special assessment-tax distinction appears in *Illinois Central R.R. v. Decatur,* 147 U.S. 190, 13 S.Ct. 293, 87 L.Ed. 132 (1893). In that case, a state statute granted an exemption to a private railroad "from all taxation under the laws of this State until sold." The Court held that this exemption would not extend to a county "assessment" against the railroad to defray the costs of grading and paving an adjacent street. The Court turned first "to the language employed

in granting this exemption to see what the legislature intended." *Id.* at 203, 13 S.Ct. at 296. The state of Illinois seldom, if ever, appropriated money for local improvements, the Court found, and thus the exemption "must be held to contemplate a release, only as to such charges as would ordinarily find their way into the state treasury for legislative appropriation." *Id.* at 204, 13 S.Ct. at 296. That reasoning followed the rule widely accepted among the states that an exemption from taxation usually does not apply to special assessments that theoretically increase the value of the affected property.

From these cases some general rules emerge. When a tax exemption is granted to certain private entities, the statutory language is construed closely because its affords a special privilege not available to others. Likewise, when a statute waives the federal government's freedom from local taxation, that language is also narrowly construed because it defeats the immunity shielding the federal government. In interpreting an exemption statute, the intention of the legislative body is pivotal. Moreover, as *Decatur* illustrates, the fact that expenditures for local improvements are financed solely by municipalities without assistance from the state legislature may be an element in determining whether special assessments qualify as a tax. These factors are helpful in construing section 546b.

Initially, we examine the status of Amtrak. Although the statute provides expressly that Amtrak is neither "an agency or establishment of the United States Government," 45 U.S.C. § 541, the Corporation also is obviously not an ordinary private firm. Its Board of Directors consists of nine individuals, including the Secretary of Transportation ex officio, three members appointed by the President with Senate confirmation, and two members selected by the President from a list compiled by commuter authorities. *Id.* § 543. Compensation for the officers is set by a schedule formulated by Congress. *Id.* § 544.

The United States owns the railroad's preferred stock which is specifically not subject to the annual fee of the District of Columbia or to "any other form of taxation." *Id.* Congress appropriates sums for capital improvement and subsidies to replace revenue deficiencies, periodically adjusts Amtrak's regulatory scheme, and designates the national rail route system. *Id.* §§ 541-658.

It is not necessary to decide here whether Amtrak is an "instrumentality" of the federal government; the unique structure and mission of the Corporation are sufficient to remove it from the realm of purely private entities. Consequently, we need not assume that the customary presumption of obligation to pay state and local taxes applies to the Corporation. To the contrary, the signals point the other way. The House Committee on Energy and Commerce said that Amtrak was to be exempt from payment of "all state and local taxes, *including but not limited to* property taxes, income and franchise taxes, sales taxes, gross revenue taxes, fuel taxes, licenses and other fees, *to the same extent as the United States is exempt* from the payment of such taxes or other fees." H.R.Rep. No. 81, 97th Cong., 1st Sess. 21 (1981), *quoted in* 665 F.Supp. at 405 n. 7 (emphasis supplied).

As a consequence of America's federal ties, we must apply the rule compelling a liberal construction of a governmental exemption and we will interpret the statutory language in a manner consistent with federal immunity from local taxes. The apportionment between state and local funding which influenced the *Decatur* decision is not implicated here. Rather, the principles of federal supremacy guide us.

The statute's text, its legislative history, and analogous caselaw persuade us to give the exemption in section 546b a broad interpretation that fulfills the intent of Congress. That intention is clear—to impose a passenger rail "user fee" on state and local governments. It would be mani-

festly inconsistent with that design to make Amtrak pay for related local improvements in the many instances where the states could, and would, impose them. Therefore, we hold that Amtrak's immunity from local "taxes or other fees" in section 546b extends to assessments for local improvements of the kind at issue here.

Accordingly, we will affirm the judgment of the district court.

IN THE SUPREME COURT
OF THE UNITED STATES

No. 88-398

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION

Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit.

Oct. 11, 1988. Denied.

APPENDIX E

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 1271, Docket 89-7271

NATIONAL RAILROAD PASSENGER CORPORATION,
Plaintiff-Appellant,

v.

THE CITY OF NEW YORK,
Defendant-Appellee.

Argued June 19, 1989
Decided Aug. 16, 1989

Before MESKILL, PIERCE, and MAHONEY, Circuit Judges.

MESKILL, Circuit Judge:

This is an appeal from an order entered in the United States District Court for the Southern District of New York, Conner, *J.*, granting summary judgment to defendant-appellee, the City of New York. The district court's decision is reported at 695 F.Supp. 1570 (S.D.N.Y. 1988). Plaintiff-appellant National Railroad Passenger Corp. (Amtrak), a federally subsidized corporation, filed a complaint in the district court requesting a declaration that it is exempt from the payment to the City of money due under two contracts (or "certificates") dating from the early twentieth century between the City and Amtrak's

predecessors in interest. Amtrak claimed this exemption under 45 U.S.C. § 546b (1982).

The district court held that Congress intended to exempt Amtrak only from the payment of taxes, and that the exemption was intended to extend only as far as the federal government is exempted from the payment of taxes. Because the court concluded that the payments in question were not taxes from which the government would be exempt, it granted summary judgment to the City. Amtrak appeals from this decision.

We affirm.

BACKGROUND

In 1902, the Board of Rapid Transit Railroad Commissioners for the City of New York entered into an agreement with the Pennsylvania, New York and Long Island Railroad Co. (the Penn. Railroad) which granted the Penn. Railroad certain rights to use City property. This agreement (the 1902 certificate) allowed the Penn. Railroad "to construct and operate its railroad along the said routes and under lands, streets, avenues, waters, rivers, highways and public places in the City." In return for this privilege, the Penn. Railroad was to pay an annual "sum or rental" to the City. The amount of money due each year could be recalculated every twenty-five years. The City retained the right to use the railroad's tunnels for the placement of communication wires. The certificate described the agreement as a "franchise" and it has been amended several times. Amtrak is the successor in interest to the Penn. Railroad.

The second certificate was agreed to in 1907 by the Board of Rapid Transit Railroad Commissioners and the New York Connecting Railroad Co. (the NY Railroad). This certificate (the 1907 certificate) granted the NY Railroad the right to build and maintain tunnels and facilities under city streets and other publicly owned land. Similar to the terms of the 1902 certificate, the 1907

certificate specified that the NY Railroad would pay the City "certain sums or rentals," the amount of which was to be redetermined every twenty-five years. As did the 1902 certificate, this certificate described the nature of the transaction as the granting of a franchise to the railroad. The rights granted by the 1907 certificate were granted "in perpetuity," and the payments to be made by the NY Railroad were designated as "over and above all taxes lawfully levied upon the property of the [NY Railroad]." The City again reserved the right to use railroad tunnel space for the installation of communication lines. This certificate has also been amended. Amtrak is the successor in interest to the NY Railroad.

In 1981, Congress passed a law prohibiting federal Amtrak subsidies from being used to pay state or local taxes during fiscal year 1981-82. Department of Transportation and Related Agencies Appropriation Act, 1982, Pub.L. No. 97-102, tit. I, 95 Stat. 1442, 1451 (1981). In 1982, Congress enacted legislation granting Amtrak an exemption from "taxes or other fees" assessed by state or local authorities, retroactive to October 1, 1981. Supplemental Appropriations Act, 1982, Pub.L. No. 97-257, tit. I, ch. XII, 96 Stat. 818, 852-53 (codified at 45 U.S.C. § 546b (1982)). It is this section, section 546b, that Amtrak alleges exempts it from having to make payments to the City under the 1902 and 1907 certificates.

After the City sent Amtrak several bills in the 1980s for "railroad privilege[s]" and "railroad franchise[s]" under the certificates, and after Amtrak refused to pay these bills. Amtrak and the City entered into an agreement governing their future rights and obligations under the certificates. They agreed to litigate the issue whether Amtrak was exempt from making the contested payments to the City.

Subsequently, Amtrak filed suit in the Southern District of New York, requesting a declaration that section 546b exempts it from the payments specified by the 1902 and

1907 certificates and an injunction against the City's collection of these payments. The City never filed an answer to Amtrak's complaint, but it apparently made a motion for summary judgment at a pre-trial conference held before Judge Conner.[1] Based on a joint statement of facts submitted by the City and Amtrak, Judge Conner granted the City's motion.

The district court first determined that the plain language of section 546b did not expressly include or exclude payments of the type required by the certificates. After reviewing the legislative history of section 546b, it concluded that Congress intended to exempt Amtrak from state and local taxation to the same extent that the United States is exempt from state taxation. 695 F.Supp. at 1573. Under the law of sovereign tax immunity, the district court held that the City could collect the payments at issue from Amtrak "if the payments (1) do not discriminate against federal functions; (2) are based on a fair approximation of Amtrak's use of City property; and (3) do not exceed the total cost to the City of the benefits supplied to Amtrak." *Id.* at 1575. Applying this test, the district court determined that the payments are not taxes from which Amtrak is exempt under section 546b. In addition, the court found that the payments were not "other fees" within the meaning of that section. *Id.* at 1577.

The court entered an order to this effect, from which Amtrak appeals.

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[1] Judge Conner's order refers to cross-motions by the parties for summary judgment. However, no such motions or notices of motion are listed on the district court docket sheet. Presumably, the motions were made at one of the two pre-trial conferences held by Judge Conner.

DISCUSSION

A. *The Appeal from the Order*

Amtrak's appeal is taken from an "order" entered in the district court. In most circumstances, however, a separate document denominated a "judgment" must be entered, and an appeal should be taken from that document. *See* Fed.R.Civ.P. 58, *Kanematsu-Gosho, Ltd. v. M/T Messiniaki Aigli,* 805 F.2d 47, 48-49 (2d Cir. 1986) (per curiam) (rejecting rule that a "separate order . . . could constitute the separate document required"). However, where the parties have consented to the appeal of an order without the entry of a separate judgment, a court of appeals has jurisdiction to hear the appeal. *See Bankers Trust Co. v. Mallis,* 435 U.S. 381, 386, 98 S.Ct. 1117, 1120, 55 L.Ed.2d 357 (1978) (per curiam) (parties can waive requirement of separate entry of judgment); *RR Village Ass'n, Inc. v. Denver Sewer Corp.*, 826 F.2d 1197, 1201 (2d Cir.1987) ("a one-sentence order denying a motion satisfies the separate-document requirement"); *Finn v. Prudential-Bache Sec., Inc.*, 821 F.2d 581, 585 (11th Cir.1987) (where order granting summary judgment was entered, but no document titled "judgment" was entered, and appellee did not object to appeal, appellate jurisdiction existed); *see also Fennell v. TLB Kent Co.*, 865 F.2d 498, 499 n. 1 (2d Cir.1989) (lack of separate entry of judgment not fatal to appeal); *John Doe Corp. v. John Doe Agency,* 850 F.2d 105, 107-08 (2d Cir.1988) (failure to enter separate judgment did not prevent exercise of jurisdiction where district court contemplated no further proceedings), *cert. granted,* —— U.S. ——, 109 S.Ct. 1116, 103 L.Ed.2d 179 (1989); *United States v. Benevento,* 836 F.2d 129, 130 n. 1 (2d Cir.1988) (per curiam) (opinion and order representing final decision in case sufficient to satisfy requirements of Rule 58).

In this case, the parties have clearly consented to the appeal, as one party brought the appeal and the other

has not contested our jurisdiction. Furthermore, there are no issues remaining for resolution in the district court; Judge Conner's order was intended to be the final action in this case. We therefore have jurisdiction to hear this appeal.

B. *Summary Judgment*

Summary judgment is proper under Fed.R.Civ.P. 56(c) when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Of course, the determination of which facts are material depends on the legal standards governing any particular issue. *See Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); *Greater Buffalo Press, Inc. v. Federal Reserve Bank*, 866 F.2d 38, 42 (2d Cir.), *cert. denied*, —— U.S. ——, 109 S.Ct. 3159, 104 L.Ed.2d 1022 (1989). All inferences must be drawn in favor of the party opposing the motion and only if "no reasonable trier of fact could find in favor of the nonmoving party" should summary judgment be granted. *H.L. Hayden Co. v. Siemens Medical Sys., Inc.*, 879 F.2d 1005, 1011 (2d Cir.1989). In other words, only where the entire record would inevitably lead a rational trier of fact to find for the moving party is summary judgment warranted. *See Anderson*, 477 U.S. at 249-50, 106 S.Ct. at 2510-11; *H.L. Hayden*, 879 F.2d at 1012. Our review of a grant of summary judgment is *de novo*. *Id.* at 1011-12.

C. *The Merits*

1. *The Nature of the Exclusion*

Section 546b reads, in pertinent part:

> Notwithstanding any other provision of law, [Amtrak] shall be exempt from any taxes or other fees imposed by any State, political subdivision of a State, or local taxing authority which are levied on

> [Amtrak], or any railroad subsidiary thereof, from and after October 1, 1981 . . . *Provided, however,* That notwithstanding any provision of law, [Amtrak] shall not be exempt from any taxes or other fees which it is authorized to pay as of September 10, 1982.

45 U.S.C. § 546b. On their face, the words "any taxes or other fees" do not have a readily discernible meaning. Their ambiguity combined with the use of the verbs "imposed" and "levied," words normally applied to taxes and non-consensual fees, require us to look to the legislative history of section 546b to establish the intent behind the enactment of that section. *See Blum v. Stenson,* 465 U.S. 886, 896, 104 S.Ct. 1541, 1547, 79 L.Ed.2d 891 (1984).

In a House of Representatives report on a preliminary version of the provision eventually enacted as section 546b, the Committee on Energy and Commerce reported that it believed that "Amtrak should be exempt from the payment of state and local taxes." H.R.Rep. No. 81, 97th Cong., 1st Sess. 19 (1981). In discussing this provision, the Committee quoted from a United States Department of Transportation (DOT) report that had reached the same conclusion. The DOT report and the Committee report were addressed exclusively to the subjects of taxes as well as "fees" that had the effect of taxes. *See id.* at 19-21. Thus, the Committee cited the following non-exclusive list of payments from which Amtrak would be exempt: " 'property taxes, income and franchise taxes, sales taxes, gross revenue taxes, fuel taxes, licenses and other fees, to the same extent as the United States is exempt from the payment of such taxes or other fees.' " *Id.* at 21. The report expressly stated, however, that "it is not the Committee's desire to exempt Amtrak from the payment of fees for services used, such as water and sewer, just as the United States is not exempt from the payment of such fees." *Id.*

The Committee also cited the DOT report in discussing the source of congressional authority for enacting such a provision. According to the DOT, an exemption for Amtrak from taxes and other fees would be authorized by the Necessary and Proper Clause, U.S. Const. art. I, § 8, cl. 18, and the Supremacy Clause, U.S. Const. art. VI, cl. 2, of the Constitution. *Id.* Detailing the power granted by these provisions, the DOT report discussed congressional ability to provide immunity from taxation. The Committee report cited no authority beyond that allowing Congress to establish tax immunities as authority for the enactment of an exemption for Amtrak. *Id.* at 21-22. The Senate, in considering the bill that gave Amtrak a temporary exemption from taxes, also cited the DOT report as support for its conclusion that Amtrak should not use federal funds, which are received through the imposition of federal taxes, to pay local taxes. S.Rep. No. 253, 97th Cong., 1st Sess. 106 (1981).

Subsequently, in considering the legislation that became section 546b, the Senate Committee on Appropriations stated that one of the reasons behind the creation of a permanent state and local tax exemption for Amtrak was that "there are many parts of the country which would gladly pay an amount equal to local or State taxes owed by Amtrak in order to have the benefit of Amtrak service." S.Rep. No. 516, 97th Cong., 2nd Sess. 170 (1982). Thus, a tax exemption would prevent Amtrak from paying state and local taxes with money received from the collection of federal taxes and would not be inequitable to those localities because they would receive the benefit of Amtrak's services.

This background demonstrates that the reason Congress chose to use the words "imposed" and "levied" in section 546b was that it believed that the bill it was considering applied to taxes and other fees that could be construed as taxes—*i.e.*, fees unilaterally imposed by a sovereign on its residents. *See National Cable Television Ass'n v.*

United States, 415 U.S. 336, 340, 94 S.Ct. 1146, 1149, 39 L.Ed.370 (1974). There is no evidence in the legislative history of section 546b that Congress' intent was to exempt Amtrak from all payments to state and local governments. To the contrary, Congress repeatedly included in reports statements that indicate that its focus was on taxation, and not payment for municipal services. Nothing in either the language of section 546b or its legislative history can be interpreted so broadly as to imply that Congress intended to enact more than a state and local tax exemption.

In its reports, Congress reiterated time and again that it was dealing with a proposed "tax" exemption for Amtrak. It specifically stated that the authority upon which it based its legislation was those sections of the Constitution that had been construed to give it the power to "legislate the immunity of Congressionally established . . . corporations from state taxation." H.R.Rep. No. 97-81 at 21. It noted the illogical nature of paying one sovereign's taxes with money received from another sovereign's imposition of taxes. It stated its intention that Amtrak pay for benefits such as sewer and water services. Finally, it used the word "fee" only in conjunction with the word "tax." There is no suggestion that fees that are different from taxes were to be included in the section 546b exemption. Nor is there an indication that Congress intended Amtrak to be able to use property, whether private or public, without paying for the right to use it.

The language used in section 546b is consistent with the distinction between taxes and non-taxes as it has developed in the courts. Just as Congress directed its attention to taxes and to fees that are, in effect, taxes, the courts have recognized that the label applied to an assessment by a state or local government does not determine whether the assessment is a tax or a non-tax. Rather,

> [t]axation is a legislative function, and [a legislature] . . . may act arbitrarily and disregard benefits

> bestowed by [a g]overnment on a taxpayer and go solely on ability to pay. . . . A fee, however, is incident to a voluntary act, *e.g.*, a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station.

National Cable, 415 U.S. at 340, 94 S.Ct. at 1149; *see also Skinner v. Mid-America Pipeline Co.*, —— U.S. ——, ——-——, 109 S.Ct. 1726, 1731-35, 104 L.Ed.2d 250 (1989); *Spiers v. Ohio Dep't of Natural Resources (In re Jenny Lynn Mining Co.)*, 780 F.2d 585, 588-89 (6th Cir.), *cert. denied*, 477 U.S. 905, 106 S.Ct. 3276, 91 L.Ed.2d 566 (1986); *County Sanitation Dist. No. 2 v. Lorber Indus. (In re Lorber Indus.)*, 675 F.2d 1062, 1066-67 (9th Cir. 1982); *City of Vanceburg v. Federal Energy Regulatory Comm'n*, 571 F.2d 630, 644-46 (D.C. Cir.1977), *cert. denied*, 439 U.S. 818, 99 S.Ct. 79, 58 L.Ed.2d 108 (1978).

As to Congress' intent that Amtrak be exempt from taxes to the same extent that the federal government is, *see National R.R. Passenger Corp. v. Commonwealth of Pa. Pub. Util. Comm'n*, 848 F.2d 436, 440 (3d Cir.), *cert. denied*, —— U.S. ——, 109 S.Ct. 231, 102 L.Ed.2d 220 (1988); H.R.Rep. No. 97-81 at 21, we note that the federal government is not exempt from the payment of rents to municipalities While in some cases the government does not pay more than a minimal amount for the use of certain land and facilities, it does pay rent for the use of others' property. In fact, the federal government rents land from New York City, including property necessary to support the use and maintenance of bridges over streets in Manhattan, "conduits, cables, manholes and light poles" associated with LaGuardia Airport in Queens, New York and an instrument landing system facility at John F. Kennedy International Airport in Queens. There is simply no policy based on governmental tax immunity that exempts the federal government from paying rent.

Based on the legislative history and the circumstances surrounding the enactment of section 546b, we conclude that Congress intended to exempt Amtrak only from the payment of taxes and fees that are the equivalent of taxes. It did not intend to exempt Amtrak from the payment of fees for the use of city services or property.

2. *The Nature of the Payments*

We now examine the nature of the payments provided for in the certificates. Although their descriptions of the payments are not dispositive, the certificates themselves describe the relationship between the City and Amtrak as a "franchise." They describe the payments to be made by Amtrak as "rent." They recite that these payments are in consideration for Amtrak's use of City property. The 1907 certificate states that the payments are over and above the amount of taxes due to the City. These facts all support a conclusion that the certificates are leases and that the payments are rent.

Nothing in the certificates indicates that the payments are taxes. The amount due was subject to renegotiation at twenty-five year intervals. If the parties failed to agree on a "reasonable" rent, the amount was to be set by the New York courts. We know of no tax that is subject to negotiation between the taxpayer and the sovereign to set its rate or that provides for its rate to be determined by the courts. Nor is a tax normally the subject of a consensual agreement between the taxpayer and the sovereign. The voluntary entry by Amtrak's predecessors and the City into the agreements counsels against interpreting the payments as taxes.

The payments in question fit precisely within the meaning of non-tax fees developed in *National Cable*. They are voluntary payments made to the City in return for a benefit, the use of City property, received by Amtrak.

Amtrak's status as a congressionally created entity does not change the nature of the payments due.[2]

Amtrak argues, however, that the nature of its relationship to the City is no longer truly voluntary, as Congress has required that Amtrak supply service to the City, as well as the entire "Northeast Corridor." *See* 45 U.S.C. §§ 502(5), 521 (1982). We agree that Amtrak's relation to the City is not the same as the relation that existed when Amtrak's predecessors and the City signed the certificates. However, this fact does not control the outcome of this dispute. That Amtrak may have less leverage than its predecessors in negotiating the amount of rent due under the certificates is no reason to classify the rent as something it is not: a tax.

We find no reason to construe the payments due to the City under the 1902 and 1907 certificates as anything other than rent, *i.e.*, payments for the benefit of Amtrak's use of City property. Therefore, Amtrak is not exempt from making these payments to the City under section 546b.

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[2] We note that under our analysis, we need not determine whether the three-prong test of *Massachusetts v. United States*, 435 U.S. 444, 466-67, 98 S.Ct. 1153, 1166-67, 55 L.Ed.2d 403 (1978), cited by the district court, 695 F.Supp. at 1575, applies to this case. The intent of Congress and the nature of the payments contemplated in the certificates clearly require that Amtrak make the payments demanded by the City. Similarly, because this case involves consensual payments made in exchange for the use of real property by Amtrak, we have no occasion to consider whether the Third Circuit's reasoning in *National Railroad Passenger Corp.*, 848 F.2d 436, would lead to a different result. In that case, the court concluded that a nonconsensual assessment on Amtrak intended to partially fund construction of a bridge was an assessment for a local improvement from which Amtrak was exempt. In contrast, the circumstances presented to us so clearly concern an area not within the parameters of section 546b that it is unnecessary to consider the federal tax immunity rules considered by the Third Circuit.

The district court properly granted summary judgment to the City. There is no genuine issue of material fact. The facts presented by the parties in their joint statement compel the conclusion that Amtrak is not exempt from the payments at issue. Considering the facts, and the inferences to be drawn from them, in the light most favorable to Amtrak, we conclude that the district court's decision should be affirmed.

CONCLUSION

Section 546b exempts Amtrak only from the payment of state and local taxes and fees that are the equivalent of taxes. The payments owed to the City by Amtrak under the 1902 and 1907 certificates are rent, and do not fall within the exemption for taxes as contemplated by Congress. Amtrak therefore is not exempt from payments required under the certificates. The order of the district court is affirmed.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 94-1776

JUDGE STANDISH
MAGISTRATE JUDGE BENSON

WHEELING & LAKE ERIE RAILWAY COMPANY,
Plaintiff,

v.

PUBLIC UTILITY COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA; DAVID W. ROLKA, CHAIRMAN OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION; JOSEPH RHODES, JR.; JOHN M. QUAIN; LISA CRUTCHFIELD; and JOHN HANGER, In Their Official Capacities as Members of the Pennsylvania Public Utility Commission; SCOTT TOWNSHIP, PENNSYLVANIA; and JAMES P. MULLIGAN, CHAIRMAN OF THE BOARD OF COMMISSIONERS OF SCOTT TOWNSHIP, PENNSYLVANIA,
Defendants.

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I. RECOMMENDATION

It is respectfully recommended that the motion for summary judgment filed by plaintiff (Docket #64) be granted; that the motions for summary judgment filed by defendants (Docket #59 and #61 be denied; and that

an order issue enjoining collection of the assessment made by the Public Utility Commission against plaintiff.

II. REPORT

This is an action filed by a railroad seeking declaratory relief under Section 306 of the Railroad Revitalization and Regulation Reform Act of 1976 (4-R Act), 49 U.S.C. § 11503, captioned "Tax Discrimination Against Rail Transportation Property." Plaintiff is an interstate rail carrier within the jurisdiction of the Interstate Commerce Commission. At issue are assessments against plaintiff levied by defendant Public Utility Commission of the Commonwealth of Pennsylvania (Commission) for the construction and future maintenance of a public highway bridge over plaintiff's tracks located in Scott Township, Pennsylvania. Plaintiff asserts that the assessment is, in fact, a discriminatory tax forbidden by Section 306. Defendants counter that the assessment is not a "tax," but is in the nature of a regulatory fee and, hence, not proscribed by Section 306. The parties have filed cross-motions for summary judgment (Docket #59, #61, #64), as well as briefs, exhibits and affidavits in support thereof (Docket #60, #63, #65, #66, #67). The parties have also filed briefs in opposition to the other parties' motions, and replies to briefs in opposition (Docket #68, #69, #70, #71, #72, #73). The motions are ripe for disposition.

SUMARY JUDGMENT STANDARD

Summary judgment is appropriate if, drawing all inferences in favor of the non-moving party, ". . . the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law." Fed. R.Civ.P. 56(c). Summary judgment may be granted against a party who fails to adduce facts sufficient to establish the existence of any element essential to that

party's case, and for which that party will bear the burden of proof at trial. *Celotex Corporation v. Catrett,* 477 U.S. 317 (1986). The moving party bears the initial burden of identifying evidence which demonstrates the absence of a genuine issue of material fact. Once that burden has been met, the non-moving party must set forth ". . . specific facts showing that there is a *genuine issue for trial* . . ." or the factual record will be taken as presented by the moving party and judgment will be entered as a matter of law. *Matsushita Electric Industrial Corp. v. Zenith Radio Corp.,* 475 U.S. 574 (1986). An issue is genuine only if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986). Stated another way, "[w]here the record taken as a whole could not lead a reasonable trier of fact to find for the non-moving party, there is no 'genuine issue for trial.' " *Matsushita,* at 589. The inquiry, then, involves determining " 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.' " *Brown v. Grabowski,* 922 F.2d 1097, 1111 (3d Cir. 1990), *cert. denied,* 501 U.S. 1218 (1991), *quoting Anderson, supra,* at 251-52. If a court, having reviewed the evidence with this standard in mind, concludes that "the evidence is merely colorable . . . or is not significantly probative," then summary judgment may be granted. *Anderson,* at 249-50.

UNDISPUTED FACTS

On September 23, 1994, the Commission entered an order allocating costs of construction and assigning maintenance responsibility for a highway bridge carrying Old Washington Pike over plaintiff's tracks located in Scott Township, Pennsylvania.[1] Pursuant to this order, plain-

[1] The Commission's authority for this allocation is derived from Pennsylvania statutes located at 66 Pa.C.S. § 2702 and § 2704. The former provision is entitled "Construction, relocation, suspen-

tiff was directed to pay Scott Township 3% of the total construction costs incurred in rebuilding the bridge. The Commission also allocated 3% of the construction costs to Conrail, 7% of the costs to the Pennsylvania Department of Transportation, and 87% to Scott Township. The Commission allocated 15% of the cost of future maintenance of the bridge (exclusive of ice or snow removal) to plaintiff. The remaining maintenance costs were allocated 15% to Conrail, and 70% to Scott Township. Plaintiff estimates that its allocated portion of the construction costs will total approximately $75,000, and has no estimate of what the maintenance costs will be in the future.

ANALYSIS

In response to the decline of the railroads in this country, Congress, in 1976, enacted Section 306 to lift the often "heavy hand of state and local taxation" from railroads. *See, Clinchfield R.R. v. Lynch,* 700 F.2d 126, 128 n.1 (4th Cir. 1983); *Oglivie v. State Board of Equalization,* 657 F.2d 204, 206-08 (8th Cir. 1981).[2] The entire text of Section 306(b) reads as follows:

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sion and abolition of crossings." The latter provision is entitled "Compensation for damages occasioned by construction, relocation or abolition of "crossings," and provides in relevant part that

> "the cost of construction, relocation, alteration, protection, or abolition of such crossing, and of facilities at or adjacent to such crossing which are used in any kind of public utility service, shall be borne and paid, as provided in this section, by the public utilities or municipal corporations concerned, or by the Commonwealth, in such proper proportions as the commission may, after due notice and hearing, determine . . . ." 66 Pa.C.S. § 2704.

A railway company is considered a "utility" for purposes of this section. *See, e.g., Pittsburgh and Lake Erie Railway Company v. Pennsylvania Public Utility Commission,* 124 Pa.Cmwlth. 611, 556 A.2d 944 (1989) (Commission could impose responsibility for maintaining pier of bridge over railway's property on railway).

[2] Judge Posner explains the plight of the railroads in this fashion:

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.

(3) levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

49 U.S.C. § 11503(b)(1-4). The first three subparagraphs deal with the assessment of the value of real

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Railroads have long been attractive targets for state and local taxing authorities: so many railroad assets are at once specialized to railroading and physically immobile that it is very difficult for railroads to escape heavy taxation by transferring the assets to another industry or location; in other words, the 'exit' option for limiting political exploitation is denied them.

Burlington Northern v. City of Superior, Wisconsin, 932 F.2d 1185, 1186 (7th Cir. 1991).

property owned by railroads, and the rate of real property taxes collected from railroads. Here, there is no tax on real property at issue, nor is the assessed value of real property involved.[3] Rather, plaintiff relies upon subsection b(4), which "is a catch-all designed to prevent the state from accomplishing the forbidden end of discriminating against railroads by substituting another type of tax" for a discriminatory property tax. *Burlington Northern, supra,* 932 F.2d at 1186. This subsection is violated whenever a state practice "imposes a proportionately heavier tax on railroading than on other activities, even if the taxing authority might be able to show that the activity imposes a disproportionate burden on public services." *Id.* at 1187.

Not all amounts which a state seeks to recover from a railroad are "taxes" for purposes of Section 306(b)(4). In this respect, defendants argued in a motion to dismiss earlier denied by this court that they are, in fact, not taxing plaintiff for the construction and maintenance of the bridge, but are, instead, collecting the equivalent of a fee for regulation of the railroad. The distinction which defendants sought to apply was explained in *Union Pacific Railroad Company v. Public Utility Commission,* 899 F.2d 854 (9th Cir. 1990). In that case, Oregon's Public Utility Commission assessed a levy against railroads to collect their proportionate share of the costs incurred by the Commission in performing its regulatory duties with respect to railroads. Specifically, the Oregon Commission regulates safety at railroad crossings, the working environment of railroad employees, regulates the transportation of hazardous materials, enforces the Federal Rail Safety

[3] To avoid any confusion, from this point on the term "assessment" refers only to the amount that the Commission has determined should be paid by plaintiff for the bridge construction and maintenance. This "assessment" should not be confused with the process of assessing the value of real property, an issue addressed in § 11503(b)(1-3), but which is not at issue in this case.

Program standards and administers a program to assure adequate rail services to Oregon rail users. The *Union Pacific* court found that the levy in question was not a "tax" since it "is designed to recoup the costs of a regulatory program from members of the industry regulated, rather than to raise general revenues [footnote omitted]." *Id.* at 859. The court in *Union Pacific* found particularly compelling the fact that the practice complained of had been in force for some time before enactment of Section 306, but that such levies were not mentioned in the legislative history of Act. *Id.* at 857. Hence, the court concluded that the levy, limited as it was to the cost of regulating certain railroad activities, was not addressed by Section 306, since the levy posed no danger that "the State would assess Union Pacific unfairly or for the purpose of raising general revenue in violation of the spirit of the R-4 Act." *Id.* at 858.

The court has already ruled that *Union Pacific* is unavailing to defendants in this case. The assessment in this case is clearly not meant to pay the costs of the Commission's operations, nor does it purport to pay the costs of any regulatory body. Therefore, the assessment cannot be termed a "fee" which would be exempted from the scope of Section 306 under the rationale of *Union Pacific*. Rather, the assessment is directly payable to a political subdivision of the state, Scott Township, to defray the cost of construction and maintenance of a public project, specifically a highway bridge. To use another distinction relied upon by the *Union Pacific*, the assessment in this case does not serve in any fashion to "regulate activities" of the railroad, but serves, instead, to raise revenues for Scott Township for the purpose of funding the construction and maintenance of a public project. *Id.* at 859.

The court has also rejected defendants' attempt to rely upon *SEPTA v. Public Utility Commission*, 140 Pa.

Cmwlth.Ct. 270, 592 A.2d 797 (1991), *allocatur denied*, 611 A.2d 714 (1992). In that case, the court was analyzing the effect of an exemption from local taxes and fees granted to Amtrak under 45 U.S.C. § 546b, and extended to SEPTA pursuant to § 581(c)(5) "to the same extent as" Amtrack. The Commonwealth Court of Pennsylvania found that the Commission's imposition of costs for a bridge over a rail line was not a "tax" for purposes of 45 U.S.C. § 581(c)(5). Commonwealth Court so held even though the Court of Appeals for the Third Circuit in *National Railroad Passenger Corp. v. Pa. Public Utilities Commission*, 848 F.2d 436 (3d Cir. 1988), had found that § 546b exempts Amtrack from all local taxes and fees, including those to fund local improvements in the nature of a bridge over the rail line. Commonwealth Court distinguished its case on the basis that SEPTA is not a federal instrumentality as is Amtrack, and that the exemption available under § 581(c)(5) is not as broad as that available under § 546b. In *SEPTA v. Pennsylvania Public Utility Commission*, 826 F.Supp. 1506 (E.D.Pa. 1993), *aff'd* 27 F.3d 558 (1994), however, the Eastern district court held, to the contrary, that § 581 (c)(5) does exempt SEPTA from maintenance fees for bridges to the same extent as Amtrack is exempt under § 546b. Commonwealth Court's conclusion, then, has been soundly rejected. *See, also, SEPTA v. Pennsylvania Public Utility Commission*, 802 F.Supp. 1273 (E.D.Pa. 1992) (same).

Defendants now seek summary judgment and rely principally on *Chicago & North Western Transportation Co. v. Webster County*, 71 F.3d 265 (8th Cir. 1995), for the proposition that the action taken by Scott Township and the PUC was not a "tax" as contemplated under the 4-R Act. In that case, Webster County decided to enlarge a drainage ditch which was crossed at some point by a railroad right-of-way. Webster County ordered the railroad to install a new culvert in the area of the ditch within the right-of-way and, when the railroad refused,

installed a new culvert and billed the railroad as it is entitled to do under state law. In affirming the district court's holding that this assessment was not a tax, the court made the following statement:

> Given the facts of this case, we agree with the district court that the board is not using Iowa drainage laws to tax the railroad. The board is not raising revenue from the railroad to expend for the general public benefit; it simply wants reimbursement for building a culvert that benefits the railroad alone.
>
> We reject the railroad's contention that the board is using the drainage laws to finance a project that benefits all of the residents in the drainage district. It is true that the general public will benefit from the board's efforts to improve drainage. It is also true that the improvement project requires widening the ditch through the right-of-way. The board, however, does not seek to recover the cost of widening the ditch, and if the board had demanded that the railroad expand the ditch, we would face an entirely different difficulty. Here the board seeks reimbursement only for that portion of the project which keeps the railroad's roadway intact.
>
> The same improvement in drainage, with the same benefit to the public, would have resulted if the board had bulldozed a ditch through the right-of-way instead of installing a culvert. The board could have, without compensating the railroad, been authorized to do just that, because it is well settled that railroads are not entitled to compensation for damage to their roadbeds caused by the installation of drainage improvements. [citations omitted].

Id. at 267. Here, the very situation which was described in *Webster* hypothetically has occurred in fact. Plaintiff is not being asked to fund an improvement which will benefit only plaintiff. Rather, plaintiff is being singled out

for contribution to a public project which benefits all residents of Scott Township and, in fact, all users of the public roadway. It will be seen how similar is this to the hypothetical posed in *Webster*, i.e., "if the board had demanded that the railroad expand the ditch." Plaintiff has not been asked to pay for an improvement which benefits the plaintiff alone. Not only is *Webster* unpersuasive authority for defendants, but it in fact supports plaintiff's position that the assessment in this case is a tax for purposes of Section 306.

There is also a dispute in this case concerning whether the tax imposed on the railway is discriminatory. The only entities subject to the tax in question are railroads and public utilities. And here, no assessment was in fact made against any public utility. Further, the proper comparison classes for purposes of the issue of discrimination are either "competing transportation modes" or the broader class of "commercial and industrial taxpayers." *See, e.g., National R.R. Passenger Corp. v. State Board of Equalization*, 652 F.Supp. 923 (N.D.Cal 1986); *Burlington Northern R.R. v. Triplett*, 682 F.Supp. 443 (D.Minn. 1988); *Atchison, Topeka and Santa Fe Railway v. Bair*, 338 N.W.2d 338 (Iowa 1983). In *Atchison, Topeka and Santa Fe Railway v. State of Arizona*, 78 F.3d 438 (9th Cir. 1996), the Ninth Circuit Court addressed transaction privilege and use taxes which were assessed against a railroad. The railroad claimed that these taxes were discriminatory because, *inter alia*, motor carriers were exempted from them. And the district court found that the taxes were indeed discriminatory for that reason: the railroad's competitors, motor carriers, were not subject to the same tax. The court held, however, that the comparison class should be *all* commercial and industrial taxpayers who are also subject to the same tax, since the taxes in question "are generally applicable taxes," that at least 140,000 businesses were subject to the transaction privilege tax, and that all businesses were subject to the use tax. *Id.* at 443.

Defendants, relying upon *Atchison*, thus assert that the proper focus of the court's discrimination analysis ought to be the other entities which are subject to the tax in question, and whether or not plaintiff is being treated fairly in comparison with those entities. I think the defendants misunderstand the import of the *Atchison* decision. In *Atchison*, the court quoted with approval from *Kansas City S.Ry. v. McNamara*, 817 F.2d 368, 375 (5th Cir. 1987), as follows:

> The only simple way to prevent tax discrimination against the railroads is to tie their tax fate to the fate of a large group of taxpayers . . . . We think the best course is to require that the railroads be taxed only under taxes applicable to 'other commercial and industrial' taxpayers.

Thus, the question is not limited merely to the other entities which are subject to the tax in question (unless that tax is applicable generally to other commercial and industrial taxpayers). Here, the tax is applicable only to railroads and, if the Commission believes it appropriate, to public utilities. This is not the type of "generally applicable" tax which was present in *Atchison*, and does not give the proper base for comparison. Instead, the fact that the tax is applicable to only railroads and public utilities conclusively establishes, in the court's view, that it is discriminatory when considered in light of the class of other commercial and industrial taxpayers, who are not subject to such a tax. In short, the evidence of record supports only one conclusion, and that is that the tax in question discriminates against railroads in comparison to the greater class of commercial and industrial taxpayer who are not subject to the tax.[4] Plaintiff is entitled to summary judgment in the nature of an injunction against collection of the tax in this matter.

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[4] The same conclusion must also be reached if the comparison class is limited to competitors, i.e., motor carriers, who are likewise not subject to the tax.

CONSTITUTIONALITY OF § 306

The PUC also asserts that, if the assessment in question is one that is prohibited by § 306 of the Act, then that portion of the Act is unconstitutional. The PUC asserts that, as applied in this case, § 306 would violate the Tenth Amendment since it would compel the Commission to regulate rail highway crossings pursuant to federal direction and without federal preemption. The PUC relies upon the decision in *New York v. United States,* 505 U.S. 144 (1992). In that case, the Court was concerned with the Low-Level Radioactive Waste Policy Amendments Act of 1985 which required states, as an alternative to federal regulation, to accept ownership of low-level radioactive waste generated within its borders and to be liable for all damages suffered by waste generators as a result of a failure to take title promptly. The Court found these provisions unconstitutional under the Tenth Amendment since it required the state to enact and enforce a federal regulatory program. This, the Court held, gave the States at issue a "choice" between two alternatives that Congress was not empowered to impose upon the States. Specifically, the states were being compelled to enforce a federal regulatory subsidy to waste producers, or were being forced to take title to the waste. The Court ended its analysis as follows:

> The take title provision appears to be unique. No other federal statute has been cited which offers a state government no option other than that of implementing legislation enacted by Congress. Whether one views the take title provision as lying outside Congress' enumerated powers, or as infringing upon the core of state sovereignty reserved by the Tenth Amendment, the provision is inconsistent with the federal structure of our Government established by the Constitution.

Id. at 177.

In this case, there is no infringement upon the core function of the state in regulating its roadways. The manner of repairs or regulation of roadways has not been impacted at all by the Act. Instead, the manner of state taxation of an entity engaged in interstate commerce is at issue here. All that the Act prohibits is the discriminatory taxation of railroads, regardless of the purpose of that taxation. The state is not, in fact, prevented from imposing a tax upon railroads which helps fund roadway improvements like those involved in this case. The only limitation imposed by Congress is that a state may not impose such a tax only on railroads, or in a fashion which discriminates against railroads. The Act is not unconstitutional. *See, State of Tennessee v. Louisville & Nashville R.R.*, 478 F. Supp. 199 (M.D.Tenn. 1979), *affirmed*, 652 F.2d 59 (6th Cir. 1980), *cert. denied*, 454 U.S. (1981) (rejecting 10th Amendment challenge to § 306); *State of Arizona v. Atchison, Topeka and Santa Fe R.R.*, 656 F.2d 398 (9th Cir. 1981) (same).

CLAIM PRECLUSION

Defendant Scott Township also asserts that the issue of § 306 discrimination was raised and litigated before the PUC's Administrative Law Judge and, therefore, this court should not reach the issue. In another case which dealt with the Amtrak exemption under 45 U.S.C. § 546(b), *National R.R. Passenger Corp. v. Commonwealth of Pennsylvania PUC*, 665 F.Supp. 402 (E.D.Pa. 1987), the court found that the PUC's administrative proceedings did not comprise a "court of competent jurisdiction" to determine whether federal law prevented Amtrak from being assessed bridge construction and maintenance fees. The Eastern district court noted that the PUC is limited to a determination of whether the apportionment was "just and reasonable." *Id.* at 408. That scope of review did not, explicitly or implicitly, give the PUC the authority or the expertise to determine whether the assessment comported with federal law. Likewise, in this case, the PUC has no

authority under state law to interpret federal limitations on the taxation of railroads. Further, even if the PUC did have such authority, because it is the very taxing authority whose actions are being reviewed, it would not be appropriate to defer to that entity's decision on the applicability of federal law. *See, e.g., Union Pacific R.R. v. Oregon Department of Rev.*, 920 F.2d 581, 585 (9th Cir. 1990) (federal deference to state expertise not warranted in § 306 cases).

CONCLUSION

Wherefore, on the basis of the foregoing, it is respectfully recommended that the motion for summary judgment filed by plaintiff (Docket #64) be granted. It is further recommended that the motions for summary judgment filed by defendants (Docket #59 and #61) be denied. Finally, it is recommended that an order issue, in substantially the same form as the proposed order attached hereto, enjoining collection of the assessment in this matter.

In accordance with the Magistrates Act, 28 U.S.C. Section 636(b)(1)(B) and (C), and Local Rule 72.1.4 B, the parties are allowed ten (10) days from the date of service to file written objections to this report. Any party opposing the objections shall have seven (7) days from the date of service of objections to respond thereto. Failure to timely file objections may constitute a waiver of any appellate rights.

/s/ Kenneth J. Benson
KENNETH J. BENSON
United States Magistrate Judge

Dated: September 3, 1996

APPENDIX H

[Docketed Oct. 24, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 94-1776

JUDGE STANDISH
MAGISTRATE JUDGE BENSON

WHEELING & LAKE ERIE RAILWAY COMPANY,
Plaintiff,

v.

PUBLIC UTILITY COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA; DAVID W. ROLKA, CHAIRMAN OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION; JOSEPH RHODES, JR.; JOHN M. QUAIN; LISA CRUTCHFIELD; and JOHN HANGER, In Their Official Capacities as Members of the Pennsylvania Public Utility Commission; SCOTT TOWNSHIP, PENNSYLVANIA; and JAMES P. MULLIGAN, CHAIRMAN OF THE BOARD OF COMMISSIONERS OF SCOTT TOWNSHIP, PENNSYLVANIA,
Defendants.

MEMORANDUM ORDER

On October 24, 1994, this case was referred to United States Magistrate Judge Kenneth J. Benson for pretrial proceedings in accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1)(A) and (B), and Local Rule 72.1.3.

The magistrate judge's report and recommendation, filed on September 3, 1996, recommended that the motion for summary judgment filed by plaintiff (Docket #64) be granted; that the motions for summary judgment filed by defendants (Docket #59 and #61) be denied; and that an order issue enjoining collection of the assessment made by the Public Utility Commission against plaintiff. The parties were allowed ten (10) days from the date of service to file objections. Service was made on all counsel by first-class mail on September 3, 1996. Objections were filed by defendants Pennsylvania Utility Commission, David W. Rolka, Joseph Rhodes, Jr., John M. Quain, Lisa Crutchfield, and John Hanger on September 13, 1996 (Docket #77), and objections were filed by defendants Scott Township, Pennsylvania and James P. Mulligan on September 17, 1996 (Docket #78). On October 7, 1996, plaintiff filed a response to defendants' objections (Docket #80). After *de novo* review of the pleadings and documents in the case, together with the report and recommendation, objections and response thereto, the following order is entered:

AND NOW, this 11th day of October, 1996;

IT IS HEREBY ORDERED that the motion for summary judgment filed by plaintiff (Docket #64) is granted, and that the motions for summary judgment filed by defendants (Docket #59 and #61) are denied.

The report and recommendation of United States Magistrate Judge Kenneth J. Benson, dated September 3, 1996 (Docket #75), is adopted as the opinion of the court.

/s/ William L. Standish
WILLIAM L. STANDISH
United States District Judge

APPENDIX I

[Docketed Oct. 24, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 94-1776

JUDGE STANDISH
MAGISTRATE JUDGE BENSON

WHEELING & LAKE ERIE RAILWAY COMPANY,
Plaintiff,

v.

PUBLIC UTILITY COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA; DAVID W. ROLKA, CHAIRMAN OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION; JOSEPH RHODES, JR.; JOHN M. QUAIN; LISA CRUTCHFIELD; and JOHN HANGER, In Their Official Capacities as Members of the Pennsylvania Public Utility Commission; SCOTT TOWNSHIP, PENNSYLVANIA; and JAMES P. MULLIGAN, CHAIRMAN OF THE BOARD OF COMMISSIONERS OF SCOTT TOWNSHIP, PENNSYLVANIA,
Defendants.

ORDER

AND NOW, this 11th day of October, 1996;

IT IS HEREBY DECLARED that the assessment, levy or collection by the defendants of construction costs or maintenance fees associated with the Old Washington

Pike bridge against plaintiff is a discriminatory tax which violates Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 11503.

IT IS HEREBY ORDERED that defendants are permanently enjoined from assessing against or collecting from plaintiff any costs associated with the construction or maintenance of the Old Washington Pike Bridge under 66 Pa.C.S. § 2704(a).

/s/ William L. Standish
WILLIAM L. STANDISH
United States District Judge